IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1303

QANTAS AIRWAYS LIMITED,

Petitioner,

v.

FOREMOST INTERNATIONAL TOURS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Qantas Airways Limited, the defendant and appellant in the proceedings below, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1).

Opinions Below

The opinion of the Court of Appeals is not yet officially reported; the opinion is, however, unofficially reported at 13 CCH AV.L.REP. 18,105 and is printed in the Appendix to this Petition at pages 18a-29a.

The opinion of the District Court is officially reported at 379 F.Supp. 88 (D. Hawaii 1974); the opinion is also unofficially reported at 13 CCH AV.L.REP. 17,204 and is printed in the Appendix to this Petition at pages 30a-52a.

Jurisdiction

The Judgment of the Court of Appeals was entered on October 22, 1975. Appendix, p. 53a. A timely Petition for Rehearing was denied and a timely Suggestion for a Rehearing en banc was rejected by the Court of Appeals by Order entered December 16, 1975. Appendix, p. 54a.

Question Presented

Foremost International Tours, Inc. packaged certain inclusive air tours to the South Pacific. These inclusive air tours consist of air transportation from the United States to South Pacific points, provided by a participating air carrier, and land arrangements such as hotels and car rentals in Australia and New Zealand.

Qantas, who had been a participating carrier, began to package its own inclusive air tours to the South Pacific.

Foremost then brought an action for injunctive relief and damages claiming that Qantas was engaging in a number of anticompetitive practices including the practice of packaging its own inclusive air tours. District Court Complaint, Appendix, p. 55a.

The District Court found that the anticompetitive practices alleged by Foremost were within the "initial" jurisdiction of the Civil Aeronautics Board (CAB) under §411 of the Federal Aviation Act. After a hearing, however, the District Court preliminarily enjoined Qantas with respect to two of the alleged practices, namely, the below-cost pricing of its inclusive air tours and the appropriation of business described as the "switching of tours." The District Court found that Qantas was selling below cost because Qantas was not including in its inclusive tour prices any

of the normal airline overhead costs allocable to the inclusive tours in question.

The District Court issued this injunction under the authority of the Clayton Act, finding that Foremost may be forced out of business and suffer irreparable injury if an injunction did not issue.

At the time the District Court Complaint was filed and at the time the injunction was issued, Foremost had not requested relief from the CAB.

Subsequent to the ruling and injunction of the District Court, Foremost filed a Complaint with the CAB, which in every material respect was identical to the Complaint filed in the District Court. CAB Complaint, Appendix, p. 74a.

The opinion and order of the District Court enjoining these practices was, during this time, appealed to the United States Court of Appeals for the Ninth Circuit, which affirmed the District Court.

Subsequent to the Ninth Circuit's opinion, the CAB took jurisdiction of most of the acts complained of, and most importantly took jurisdiction over the same practices enjoined by the District Court. Petition and Letter of Bureau of Enforcement, Appendix, pp. 94a, 98a.

Therefore, the question presented is:

Whether, pending determination by the Civil Aeronautics Board of alleged anticompetitive practices within its jurisdiction under §411 of the Federal Aviation Act, a District Court may under the Clayton Act enjoin a foreign air carrier with respect to those practices.

Statutes Involved

The statutes involved are the Federal Aviation Act of 1958, as amended, 49 U.S.C. §1301 *et seq.*, and the Clayton Act, 15 U.S.C. §12 *et seq.* The relevant sections of the Federal Aviation Act are §§408, 409, 411, 412, 414 and 1002(j), 49 U.S.C. §§1378, 1379, 1381, 1382, 1384, 1482(j). The relevant section of the Clayton Act is §16, 15 U.S.C. §26. The text of these sections is set forth in the Appendix to this Petition at pp. 1a-17a.

Statement

A. The Facts

Respondent Foremost International Tours, Inc. packages inclusive air tours to Australia and New Zealand from the United States, Canada and other areas. Foremost arranges for the land component portion of an inclusive air tour and markets the tour package (including air transportation) through the auspices of a participating air carrier.

Petitioner Qantas Airways Limited is a foreign air carrier within the meaning of Section 101(19) of the Federal Aviation Act, 49 U.S.C. §1301(19), and is the holder of a Foreign Air Carrier Permit issued by the CAB with the approval of the President pursuant to Sections 402 and 801 of the Act, 49 U.S.C. §§1372, 1461 (Supp. 1975). Qantas under this Permit is authorized to engage in foreign air transportation and carry passengers between the United States, and Australia and New Zealand.

Prior to April 1, 1974, Qantas had been a participating carrier for a group of inclusive air tours packaged by Foremost and marketed under the name of Royal Road Tours.

In November, 1973, Qantas decided to package its own inclusive tours to Australia and New Zealand from the United States through its own tour department, Qantas Holidays, and terminated its relationship with Foremost, effective March 31, 1974.

The sale of inclusive air tours in foreign air transportation is governed by rules and regulations established by the International Air Transport Association (IATA) to the extent approved by the CAB under Section 412 of the Act, 49 U.S.C. §1382.

In 1966 an IATA Resolution filed with the CAB for approval defined the principles under which inclusive air tours may be "initiated" (packaged) by IATA airline members. Qantas is an IATA airline member. The American Society of Travel Agents (ASTA) filed an objection with the CAB against the approval of this IATA Resolution on the grounds that the entry of the airlines into the inclusive air tour market would create substantial unfair competition for the independent travel agency industry. Notwithstanding the objection of ASTA, however, the CAB approved the Resolution under Section 412 of the Act. Order E-24886, March 23, 1967.

Minimum inclusive tour selling prices were also established by IATA Resolutions filed with and approved by the CAB pursuant to Section 412 of the Act. The relevant approved IATA Resolution states:

> "the minimum selling price of the tour per passenger shall not be less than the applicable group inclusive tour fare plus U.S. ~~$100~~ + 130 (US $90 for tours to/from Honolulu) + for the minimum stay plus US $10 for each day of the tour in excess of the minimum stay for which tour features are provided as required by Paragraph (7) above."

Qantas filed tariffs with the CAB incorporating such approved minimum tour selling prices.

On April 1, 1974, Qantas began to market and sell its own inclusive tours to Australia and New Zealand. The prices of the tours were above the approved minimum prices set forth in the IATA Resolution and Qantas' tariffs filed with the Board. 379 F.Supp. at 91-92, Appendix, pp. 33a-36a.

During the period of time after Qantas had terminated its participation in Foremost's Royal Road Tour program and the time Qantas commenced the marketing of its own inclusive air tours, travel agents continued to call Qantas to obtain information about and to purchase Foremost's Royal Road Tours. On one occasion, a Qantas employee sold a Qantas Holiday tour in response to a request concerning a Royal Road Tour. 379 F.Supp. at 92, Appendix, p. 37a.

B. Jurisdiction in the Court of First Instance

Foremost brought this antitrust action alleging violations of Sections 1 and 2 of the Sherman Act and seeking monetary and injunctive relief under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§15, 26.

Jurisdiction in the District Court was based upon 28 U.S.C. §1331 (diversity of citizenship) and 28 U.S.C. §1337 (civil actions arising under an Act of Congress protecting trade and commerce against restraints and monopolies).

C. Proceedings in the District Court

Foremost alleged in its Complaint that Qantas' conduct surrounding its entrance into the inclusive air tour business showed a "clear intent" to "monopolize" the market and that this conduct was "undertaken by Qantas with

the predatory intent and purpose to eliminate Foremost as a competitor in this market". District Court Complaint, Appendix, p. 66a.

Foremost alleged a number of specific anticompetitive acts. However, the specific anticompetitive conduct alleged by Foremost and relevant to this petition relates to:

(1) Qantas' alleged selling of its tours "below their actual cost, and without any provision for normal overhead or profit"; and

(2) Qantas' alleged misappropriation of business "intended for Foremost by inducing actual and prospective customers of Foremost to switch" to Qantas tours.

Simultaneously with the filing of the Complaint, Foremost filed a Motion for a Preliminary Injuction, claiming that it would suffer irreparable injury by being forced out of business if Qantas were not enjoined from the alleged anticompetitive acts.

The District Court concluded, as a matter of law:

> "that entry of Qantas into the inclusive tour business and its below cost pricing practice, switching of tours, as well as the other charges of anticompetitive activity —terminating a business relationship, obtaining confidential information, imitating Foremost's brochures, boycotting, tyings, and dividing the market—are within the initial jurisdiction of the CAB under section 411. 49 U.S.C. §1381." 379 F.Supp. at 94, Appendix, p. 42a.

The District Court, following *Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289 (1973), determined that it could and would continue to exercise antitrust jurisdiction over the action "but stay most proceedings thereunder pending CAB's determination of Foremost's complaint before the

CAB." 379 F.Supp. at 95, Appendix, p. 44a. At that time, however, no complaint had been filed with the CAB.

After a hearing, the District Court found that Qantas was selling "below cost" because Qantas was not including in its inclusive tour prices any of the normal airline overhead costs allocable to the inclusive tours in question.

The District Court concluded that Foremost would be adequately protected pending final determination of this action by an order:

> "enjoining Qantas from selling its tours at prices that do not include all of the costs actually attributable to the land portions plus a reasonable allocation of its office administration and general overhead expenses and, further, prohibiting Qantas from shifting to itself business committed to or intended for Foremost." 379 F. Supp. at 98, Appendix, p. 49a.

Accordingly, a preliminary injunction was granted as follows:

> "5. Pending final determination of this action, Qantas is hereby restrained and enjoined from selling inclusive 'freewheeling' tours until it has satisfied this court that the portion of the tour price applicable to the land costs includes not only the actual costs charged to Qantas for the land services, including ground and local air transportation services and hotel accommodation, but also generally including, but not limited to, administration expenses, office expenses, salaries, general in-house expenses and, possibly, advertising and brochure costs, related to Qantas' Holiday tours.
>
> 6. Pending final determination of this action,
>
> (a) Qantas is hereby restrained and enjoined from continuing to advertise or otherwise offering for sale

> or selling any of its inclusive South Pacific tours, currently offered, at the prices now set forth in its tour brochures and other advertising media until it has satisfied this court that the land tour portion thereof meets and correctly reflects Qantas' costs, as set out in number 5, *supra,* and this court has approved the same.
>
> (b) In implementing the above restraints,
>
> (1) within 30 days after the effective date of this order, Qantas shall withdraw or otherwise nullify the current authenticity of all of its brochures that contain the above proscribed tour prices;
>
> (2) within 60 days after the effective date of this order, Qantas shall withdraw from its advertising in any news media any reference to the above proscribed tour prices.
>
> 7. Pending final determination of this action, Qantas is hereby restrained and enjoined from shifting or attempting to shift to Qantas Holiday Tours, passengers who have requested or otherwise sought to purchase a Foremost Royal Road Tour to the South Pacific." 379 F.Supp. at 98-99, Appendix, pp. 51a, 52a.

D. Complaint Before the CAB

After the District Court's opinion and order issued, Foremost filed a Complaint with the CAB which was in every material way identical with the District Court Complaint. In its Complaint Foremost asked the CAB to issue "an order directing Qantas to *cease and desist* from engaging in the business of tour operator, from engaging in the above-mentioned unauthorized activities in air commerce and foreign air commerce, and from engaging in the above-

mentioned unfair and deceptive practices and unfair methods of competition." CAB Complaint, Appendix, p. 91a. (Emphasis supplied).

Subsequent to the Ninth Circuit's affirmance of the District Court, the Civil Aeronautics Board took jurisdiction over most of the alleged practices and, most importantly, those allegations dealing with "below cost pricing" and "switching of tours" concerning which the District Court had issued an injunction. CAB Complaint, Third Cause of Action, Appendix, p. 80a and Sixth Cause of Action, para. XV, Appendix, pp. 88a, 89a, and CAB Petition for Enforcement and Letter, Appendix, pp. 94a, 98a.

E. Proceedings in the United States Court of Appeals for the Ninth Circuit

The decision and order of the District Court was appealed to the United States Court of Appeals for the Ninth Circuit. Jurisdiction in the Court of Appeals was based upon 28 U.S.C. §1292(a)(1) as an appeal from an interlocutory order granting a preliminary injunction.

On appeal, Qantas argued that the matters concerning which the District Court issued its injunction were matters within the jurisdiction of the CAB, and the injunction in this case was the kind of collision between administrative and judicial regimes barred by *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963) and other decisions of this Court.

Qantas also argued that the approval of the CAB under §412 of the Federal Aviation Act (49 U.S.C. §1382) of the IATA Resolutions authorizing a foreign air carrier to package its own tours and establishing the minimum prices at which these tours may be sold, immunized Qantas from the antitrust laws, under §414 of the Federal Aviation Act (49 U.S.C. §1384), as long as Qantas sold its tours at or

above the minimum prices established by the IATA Resolution approved by the CAB. Qantas relied in part on *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363 (1973).

Qantas contended that the Board's power to suspend Qantas' tariff under §1002(j) effectively withdrew from the judiciary any pre-existing power to grant injunctive relief as this Court held with respect to the Interstate Commerce Act in *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 658 (1963) and *United States* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973).

In affirming the District Court, the Ninth Circuit based its decision on a different ground. The Ninth Circuit found that the tour industry is not *per se* regulated and is separable from the airline industry which is pervasively regulated by the CAB. In that event, where a firm in regulated industry (Qantas in the airline industry) is alleged to have committed acts having an adverse effect on a firm in an unregulated industry (Foremost in the tour industry), the Courts have antitrust jurisdiction and should maintain it, utilizing its powers (including the issuance of a preliminary injunction) as it finds necessary. Court of Appeals Opinion, Appendix, pp. 26a, 27a.

REASONS FOR GRANTING THE WRIT

1. The Ninth Circuit has decided a federal question in a way that conflicts with the applicable decisions of this Court. Supreme Court Rule 19(b).

The critical factual finding upon which the District Court issued the injunction in this case was that, according to the costing factors determined by the District Court to be applicable to the prices at which inclusive air tours may

be sold by an airline, Qantas was selling its tours "below cost".

The District Court found that Qantas was selling below cost because Qantas was not including in its inclusive tour price any of the normal airline overhead costs allocable to the inclusive tours in question. If the overhead costing factors described by the District Court were excluded, Qantas would not have been found to be selling "below cost".

As the District Court itself pointed out, however, the CAB might determine in the public interest that an airline may, in packaging inclusive air tours, pass on to the public land arrangements at cost and need not include a profit factor or the normal airline overhead costs allocable to the tours. 379 F. Supp. at 96, Appendix, p. 45a.

At the heart of this controversy, therefore, is the question of whether the District Court had the jurisdiction to decide the costing factors to be included in Qantas' inclusive air tours; make anti-trust findings regarding "below cost" pricing; and, applying general equity principles, issue a preliminary injunction, pending determination by the CAB.

This case, therefore, involves an important question of the jurisdiction of the District Court to act in an area regulated by the CAB. It is an important question involving the reconciliation of judicial and administrative regimes in effectuating the antitrust policies of the Congress.

a. Conflict with *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963).

In this case the District Court agreed that the CAB had jurisdiction over the alleged practices of Qantas concerning which the District Court issued its injunction. The District Court held that while the CAB had initial jurisdiction, the Court could still act to prevent irreparable harm, pending the CAB determination.

The Ninth Circuit differed with the District Court but reached the same result:

> "Were this an antitrust case where the anticompetitive effects of the complained of action were *confined* to, and primarily affected, the regulated industry, *and* the regulatory agency had the power and authority to protect the status quo, should it deem it necessary, by issuing a cease and desist order, we would then agree with appellant that in issuing a preliminary injunction the District Court would be acting contrary to the intent of Congress when it established regulatory agencies to provide pervasive, coordinated and uniform administration of an industry. These are the basic principles enunciated by the Supreme Court in *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1962)." Court of Appeals Opinion, Appendix, p. 21a.

However, the Ninth Circuit held "this is not such a case". In this case, the Ninth Circuit held that the anticompetitive effects were not so *confined* to the regulated (airline) industry, but had an adverse effect on a firm in an industry (the inclusive tour industry) not regulated by the CAB. In such case, even though the CAB has jurisdiction over the airline's practices, a District Court "should maintain its jurisdiction, and utilize its powers (including

the issuance of preliminary injunctions), as it finds necessary". Court of Appeals Opinion, Appendix, pp. 26a, 27a.

Confirming the CAB's jurisdiction over Qantas' practices, the CAB *in this case* took jurisdiction over the practices enjoined. This is wholly consistent with the fact that the CAB has undertaken to regulate aspects of the inclusive tour industry.[1] Part 378, Inclusive Tour Charters by Supplemental Air Carriers, Certain Foreign Air Carriers and Tour Operators, 14 CFR §378; Part 378a—One Stop Inclusive Tour Charters, 40 F.R. 34089. See, *United States* v. *CAB*, 511 F.2d 1315 (D.C. Cir. 1975).

Thus, in holding that the inclusive tour industry is not within the pervasive regulatory authority of the CAB, the Ninth Circuit was clearly in conflict with the CAB's perception of its jurisdiction. The Ninth Circuit's determination that the inclusive "tour industry" was not part of the "airline industry" pervasively regulated by the CAB was without any basis in the present record and was without the benefit of an administrative record or a determination of jurisdiction by the CAB. See, *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 648 (1972).

This determination by the Ninth Circuit that the inclusive tour industry was separable from the "airline industry" was critical to the result it reached, since the Ninth Circuit

[1] For example, in *Trans World Airlines, Inc., Flying Mercury, Inc.*—Enforcement Proceeding—CAB Docket 24697, Order 73-6-9 (June 4, 1973), the Board dealt with a practice which had developed wherein the land portion of an inclusive tour program was such that the tour participant rarely made use of it and it was therefore, referred to in the industry as a "throwaway". After investigation, the Board ordered TWA and Flying Mercury to cease and desist "from engaging in unfair or deceptive practices and unfair methods of competition within the meaning of Section 411 of the Act" by selling and operating inclusive tours in such a way as to permit the "throwaway" practice to persist. Order 73-6-9, p. 7.

agreed it would hold under *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963) that the District Court could not issue the injunction, if the inclusive air tour industry were under the pervasive regulatory authority of the CAB.

Qantas contends that the costing and marketing of inclusive air tours by airlines are within the pervasive authority of the CAB, and that *Pan American* and other decisions of this court bar the injunctive relief granted in this case by the District Court.

This Court in *Pan American* held that, in enacting the Federal Aviation Act, Congress created a pervasive scheme for the regulation of the air transportation industry and empowered the CAB to regulate it in accordance with the policies set forth in §102 of the Act. 49 U.S.C. §1302. *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963). This Act brought within its regulatory scheme all those who compete in the commercial market in the business of offering air transportation to the public generally. *United States* v. *Caribbean Ventures, Ltd.*, 387 F.Supp. 1256, 1260 (D.N.J. 1974). As a matter of antitrust policy, Congress in §411 of the Act gave the CAB authority to determine unfair practices and unfair methods of competition "by a foreign air carrier" "in air transportation or the sale thereof" and to prevent them by cease and desist orders. 49 U.S.C. §1381. In *Pan American*, this Court barred the courts from deciding whether practices are in violation of the antitrust laws to the extent that §411 was applicable. Otherwise "if the courts were to intrude independently with their construction of the antitrust laws, two regimes might collide". 371 U.S. at 310.

In *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363 (1973), this court described its holding in *Pan American:*

> "(T)his court held that the complaint should have been dismissed because §411 of the Act gave the CAB broad power to investigate and bring to a halt unfair practices and unfair methods of competition, including those alleged in the complaint, and because if the courts were to intrude independently with their own construction of the antitrust laws the two regimes might collide." 409 U.S. at 380.

This principle was further confirmed in *United States* v. *Michigan National Corp.*, 419 U.S. 1 (1974), a case involving the issue whether the Court proceeding should be stayed or dismissed, where the matter was within an agency's primary jurisdiction. This court stated, "We may put to one side cases where the administrative agency has exclusive jurisdiction to consider the complaint initially brought in court, e.g., *Pan American World Airways* v. *United States*, 371 U.S. 296 (1963) . . . . In such cases, the court must of course dismiss the action." 419 U.S. at 4 n2.

See also, *United States* v. *National Ass'n of Securities Dealers, Inc.*, 422 U.S. 694 (1975).

Thus, where, as here, the matters in the District Court complaint fall within the jurisdiction of the CAB under §411, *Pan American* requires a holding that the District Court is precluded, as a matter of jurisdiction, from making antitrust findings on the issue of sales "below cost" and "the switching of tours", and intruding upon the CAB's pervasive regulatory authority by issuing a preliminary injunction.

The holding of the Ninth Circuit in this case is a radical departure from *Pan American*. This Court has never restricted *Pan American* to cases where practices complained of fall within the Board's jurisdiction *and* affect only the regulated airline industry, however defined. The Ninth

Circuit's notion of intra-industry and inter-industry effects is wholly antagonistic to *Pan American*, and was in fact rejected by this Court in *Hughes Tool Co.*

Importers,[2] bus lines,[3] freight forwarders,[4] shippers, travel agents,[5] businesses in which rely on air service for the transportation of goods, fixed based operators[6] and aircraft manufacturers[7] are often affected by CAB decisions within its jurisdiction. Is the CAB's pervasive authority to be restricted when one of these industries is affected by CAB orders?

In *Hughes Tool*, Chief Justice Burger, dissenting, advanced the argument that CAB orders must be restricted in scope and effect to the airline industry and that the regulatory authority of the CAB does not extend to other industries even though connected with the airline industry, such as aircraft manufacturers involved in that case. This view was rejected by this Court. 409 U.S. at 410-411.

In undertaking to protect the unregulated industry by preliminary injunction, the Ninth Circuit has sanctioned the judicial intrusion into the CAB's regulatory authority over foreign air carriers and air transportation. Consistent with the Ninth Circuit's opinion in this case, for example, courts would be empowered to enjoin rates and charges in

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[2] *E.g. American Importers Association* v. *CAB*, 473 F.2d 168 (D.C. Cir. 1972).

[3] *E.g. Transcontinental Bus System, Inc.* v. *CAB*, 383 F.2d 466 (5th Cir. 1967).

[4] *Allied Air Freight Inc.* v. *Pan American World Airways, Inc.*, 393 F.2d 441 (2d Cir.), cert. denied, 393 U.S. 846 (1968).

[5] *McManus* v. *CAB*, 286 F.2d 414 (2d Cir.), cert. denied, 366 U.S. 928 (1961).

[6] *Butler Aviation Co.* v. *CAB*, 389 F.2d 517 (2d Cir. 1968).

[7] *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363 (1973).

collateral civil actions, if they have an adverse effect upon a complaining firm in an unregulated industry.

Instead of uniformity of regulation there would be "operational chaos." *Carter* v. *American Telephone & Telegraph Co.*, 365 F.2d 486, 496 (5th Cir. 1966), cert. denied, 385 U.S. 1008 (1967).

The Ninth Circuit's rationale is a call to the courts to provide antitrust remedies in favor of firms in an unregulated industry where a firm in a regulated industry is accused of an unfair method of competition or deceptive practice affecting them.

The Ninth Circuit's opinion in this case therefore conflicts with *Pan American,* and a writ of certiorari should be granted.

b. Conflict with *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363 (1973)

In this case, the CAB under §412 of the Act approved IATA resolutions authorizing an air carrier to package its own tours and establish the minimum prices at which these tours may be sold. 49 U.S.C. §1382.

The *sole* reason stated by the Ninth Circuit for denying Qantas antitrust immunity under §414 was that:

> "The scope of the antitrust immunity which an agency's approval can confer under statutes such as 49 U.S.C. §1384 was intended to be, and is, no broader than the industry regulated. *Butler Aviation Co.* v. *CAB,* 389 F.2d 517, 521 (2d Cir. 1968). A regulatory agency's approval of certain actions cannot confer antitrust immunity to those actions unless the primary anti-competitive effect those actions may have is limited to the industry in question." Court of Appeals Opinion, Appendix, p. 25a.

Not only does *Butler* hold *contra,* but this Court considered and rejected such an argument interposed by Chief Justice Burger in dissent in *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363 at 410-411 (1973). See also, *McManus* v. *CAB,* 286 F.2d 414, 419 (2d Cir.), cert. denied, 366 U.S. 928 (1961).

There is no provision in the statute which limits the antitrust immunity to intra-industry disputes and this Court has never so limited it. 49 U.S.C. §1384. If the agreement such as the IATA Resolutions in this case are within §412 of the Act and approved by the Board, antitrust immunity is conferred with respect to anything "authorized, approved or required" by the order approving a §412 agreement.

The Ninth Circuit's decision conflicts with the language of the statute and this Court's holding in *Hughes Tool.* A writ of certiorari should issue for that reason.

c. Conflict with *United States Navigation Co.* v. *Cunard Steamship Co.*, 284 U.S. 474 (1932) and *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 658 (1963)

Even with respect to administrative agencies having less pervasive regulatory authority, this Court has decided that courts should not enjoin an act where the agency may approve it, lest there be collision between the administrative and judicial regimes. *United States Navigation Co.* v. *Cunard Steamship Co.,* 284 U.S. 474 (1932); *Far East Conference* v. *United States,* 342 U.S. 570 (1952). See, *Atchison, Topeka & Santa Fe Ry.* v. *Wichita Board of Trade,* 412 U.S. 800, 818-826 (1973), regarding issuance of injunction pending *review* of administrative determinations.

The lack of jurisdiction in the District Court in this case to enjoin Qantas with respect to the prices at which Qantas may sell its inclusive air tours is further supported by

this Court's decisions in *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 658 (1963) and *United States* v. *Students Challenging Regulatory Agency Procedures* (*SCRAP*), 412 U.S. 669 (1973). These cases dealt with the primary jurisdiction of the ICC over rates. In *Arrow*, this Court held that Congress in giving the ICC power to suspend rates withdrew from the courts power to grant injunctive relief with respect to rates. The CAB enjoys the same suspension power. See, *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. at 666 n. 13; *Pillai* v. *CAB*, 485 F.2d 1018 (D.C. Cir. 1973).

As the District Court stated:

> "In 1972, Congress invested the CAB with specific authority to suspend or reject the tariffs of foreign air carriers. Act of Mar. 22, 1972, 86 Stat. 96, Pub. L. 92-259. Thus, the CAB has jurisdiction to grant preliminary relief against foreign air carriers in certain instances . . . .
>
> In the event the CAB interprets broadly its jurisdiction under §1482(j) and suspends or modifies Qantas' inclusive tour fares, this Court would then terminate any portions of the preliminary injunction thus jointly acted upon. This procedure satisfies the rule of *Pan American* that Courts are to avoid interfering with the CAB. 379 Fed. Supp. at 96, 97 n7, Appendix, pp. 46a, 47a.

In this case the action of the District Court barred Qantas from selling its tours in accordance with its tariff on file with the CAB, which tariff the CAB could suspend under 1002(j) of the Federal Aviation Act, 49 U.S.C. §1482(j).

Applying *Arrow* to this proceeding, therefore, because the CAB had the power to suspend the tariff and the

prices at which Qantas was selling its tours, the District Court lacked the power to issue the injunctive relief with respect to the Qantas prices. The result reached by the Ninth Circuit therefore conflicts with this Court's decision in *Arrow* and a writ of certiorari should issue.

Pan American, Hughes, Cunard and *Arrow* converge at a single point—that the District Court in this case was without power to issue the injunction granted in this case, where the matter was within the primary exclusive jurisdiction of the CAB and where the CAB had not yet acted.

The Ninth Circuit's resolution of this question is in conflict with applicable decisions of this Court and a writ of certiorari should issue.

2. The issuance of a preliminary injunction in this case, with respect to matters within the jurisdiction of an administrative agency, prior to agency determination, was unprecedented.

Extensive research has failed to disclose a judicial decision of this Court or any Court which sanctioned injunctive relief by a court against conduct within the jurisdiction of an administrative agency, prior to agency determination.

Contrary to the decision below, the District of Columbia Circuit decided that in a similar case the District Court may not grant injunctive relief. In *S.S.W., Inc.* v. *Air Transport Ass'n of America*, 191 F.2d 658 (D.C. Cir. 1951) the Court said:

> "Comparison of these provisions of the Civil Aeronautics Act with the allegations of the complaint reveals that that Act 'covers the dominant facts alleged in the present case as constituting a violation of the Anti-Trust Act'. As a result, appellant must first seek

relief from the Board. The principles underlying the doctrine of exhaustion of administrative remedies as well as the antitrust regulated industry problem point to the importance of giving the Board the first opportunity to determine the extent of its jurisdiction and to deal with matters falling within its reach. The Board may grant him all the prospective relief sought by him, since it, unlike the Interstate Commerce Commission, is empowered to issue cease and desist orders against unfair methods of competition and deceptive practices and to entertain any complaint and issue any orders necessary to carry out its power to approve or disapprove contracts and agreements among air carriers.

• • •

The Board may, of course, ultimately determine that it lacks jurisdiction over certain phases of the complaint. In that event, there will be no conflict of authority between antitrust laws and specific statute and jurisdiction will remain in the District Court to deal with such matters. But, as we have indicated, that cannot be known until the Board has had an opportunity to act on these allegations. Until it has done so, injunctive relief in the District Court is unavailable." 191 F.2d at 662, 663.

Cf. Laveson v. *Trans World Airlines*, 471 F.2d 76, 83-84 (3d Cir. 1972).

Other cases involving agencies with *less* pervasive regulatory authority have also held that an injunction should not issue on matters within the agency's jurisdiction prior to agency determination. *MCI Communications Corp.* v. *American Telephone & Telegraph Co.*, 496 F.2d 214 (3d Cir. 1974), *affirming*, 369 F.Supp. 1004, 1020 (E.D. Pa. 1974) (where irreparable injury was shown); *Delaware*

River Port Authority v. *Transamerican Trailer Transport, Inc.*, 501 F.2d 917, 923 (3d Cir. 1974); *Carter* v. *American Telephone & Telegraph Co.*, 365 F.2d 486 (5th Cir. 1966), cert. denied, 385 U.S. 1008 (1967).

Wheelabrator Corp. v. *Chafee*, 455 F.2d 1306 (D.C. Cir. 1971) relied upon by the Ninth Circuit does not hold that an injunction may issue against conduct within the jurisdiction of an agency, pending agency *determination*. The "agency" in that case (the General Accounting Office) did not have the power to *decide* the questions and issue orders relating thereto. The Court did. The GAO acknowledged that its action would not operate "as a legal or judicial determination of the rights of the parties". 455 F.2d at 1313.

Wheelabrator relates to the issuance of preliminary injunction over matters within a court's sole jurisdiction, and not to a collision of administrative and judicial regimes.

The decision of the courts below have placed Qantas in the position of satisfying both the District Court and the CAB with respect to its inclusive air tour prices. The uniformity of treatment of air carriers and foreign air carriers and the uniformity of regulation of the air transportation industry which the Federal Aviation Act was designed to achieve has been disturbed and compromised by the decisions of the courts below.

The injunction issued in this case has brought the CAB and the courts on a collision course which *Pan American* and the other cases cited by this court have repeatedly stated should be avoided. The injunction issued has disrupted an airline, regulated by the CAB, in the marketing of its air transportation and is an impermissible intrusion of the CAB's pervasive regulatory authority.

At issue here, therefore, are the respective roles and powers of the CAB and the courts in the regulation of the air transportation industry and the implementation of congressional antitrust policy. The subject matter of this controversy is the airline operated inclusive air tour, at a time when both the airlines and the CAB are attempting to provide new forms of low-cost air travel to the public. The issue to be decided in this case is, therefore, also an important industry question.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case, as prayed for herein.

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1251 Avenue of the Americas
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Dated: New York, New York
March 12, 1976

Of counsel:

CONDON & FORSYTH
THOMAS J. WHALEN
MICHAEL J. HOLLAND

Affidavit of Service

I, MICHAEL J. HOLLAND, being over the age of 18 years, an associate attorney employed by the firm of Condon & Forsyth, hereby certify that I have this 12th day of March, 1976, served three copies of the foregoing Petition for a Writ of Certiorari upon Respondent Foremost International Tours, Inc. by mailing copies thereof to its attorneys of record in sealed envelopes, with air mail postage prepaid, deposited in The United States General Post Office, located at 33rd Street and 8th Avenue, New York, New York 10001, and addressed as follows:

Alexander Anolik, Esq.
693 Sutter Street
San Francisco, California 94109

Melvin Shinn
Suite 223, 33 S. King Street
Honolulu, Hawaii 96813

/s/ MICHAEL J. HOLLAND
Michael J. Holland

Sworn to before me this
12th day of March, 1976

/s/ LAWRENCE MENTZ
Notary Public

Lawrence Mentz
Notary Public, State of New York
No. 31-4513579
Qualified in New York County

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. ~~75-~~ 1303

QANTAS AIRWAYS LIMITED,

Petitioner,

—v.—

FOREMOST INTERNATIONAL TOURS, INC.,

Respondent.

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Federal Aviation Act 1958, as amended, 49 U.S.C. § 1301 *et seq.*

§ 408, 49 U.S.C. § 1378

Consolidation, merger, and acquisition of control—Prohibited acts

(a) It shall be unlawful unless approved by order of the Board as provided in this section—

(1) For two or more air carriers, or for any air carrier and any other common carrier or any person engaged in any other phase of aeronautics, to consolidate or merge their properties, or any part thereof, into one person for the ownership, management, or operation of the properties theretofore in separate ownerships;

(2) For any air carrier, any person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to purchase, lease, or contract to operate the properties, or any substantial part thereof, of any air carrier;

(3) For any air carrier or person controlling an air carrier to purchase, lease, or contract to operate the properties, or any substantial part thereof, of any person engaged in any phase of aeronautics otherwise than as an air carrier;

(4) For any foreign air carrier or person controlling a foreign air carrier to acquire control, in any manner whatsoever, of any citizen of the United States engaged in any phase of aeronautics;

(5) For any air carrier or person controlling an air carrier, any other common carrier, any person en-

gaged in any other phase of aeronautics, or any other person to acquire control of any air carrier in any manner whatsoever: *Provided,* That the Board may by order exempt any such acquisition of a noncertificated air carrier from this requirement to the extent and for such periods as may be in the public interest;

(6) For any air carrier or person controlling an air carrier to acquire control, in any manner whatsoever, of any person engaged in any phase of aeronautics otherwise than as an air carrier; or

(7) For any person to continue to maintain any relationship established in violation of any of the foregoing subdivisions of this subsection.

Application to Board; hearing; approval; disposal without hearing

(b) Any person seeking approval of a consolidation, merger, purchase, lease, operating contract, or acquisition of control, specified in subsection (a) of this section, shall present an application to the Board, and thereupon the Board shall notify the persons involved in the consolidation, merger, purchase, lease, operating contract, or acquisition of control, and other persons known to have a substantial interest in the proceeding, of the time and place of a public hearing. Unless, after such hearing, the Board finds that the consolidation, merger, purchase, lease, operating contract, or acquisition of control will not be consistent with the public interest or that the conditions of this section will not be fulfilled, it shall by order approve such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe: *Provided,* That the Board shall not approve any consolidation, merger, purchase, lease, operating contract, or acquisition of control which would result in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier not a party to the consolidation, merger, purchase, lease, operating contract, or acquisition of control: *Provided further,* That if the applicant is a carrier other than an air carrier, or a person controlled by a carrier other than an air carrier or affiliated therewith within the meaning of section 5(8) of this title, such applicant shall for the purposes of this section be considered an air carrier and the Board shall not enter such an order of approval unless it finds that the transaction proposed will promote the public interest by enabling such carrier other than an air carrier to use aircraft to public advantage in its operation and will not restrain competition: *Provided further,* That, in any case in which the Board determines that the transaction which is the subject of the application does not affect the control of an air carrier directly engaged in the operation of aircraft in air transportation, does not result in creating a monopoly, and does not tend to restrain competition, and determines that no person disclosing a substantial interest then currently is requesting a hearing, the Board, after publication in the Federal Register of notice of the Board's intention to dispose of such application without a hearing (a copy of which notice shall be furnished by the Board to the Attorney General not later than the day following the date of such publication), may determine that the public interest does not require a hearing and by order approve or disapprove such transaction.

Interests in Ground Facilities

(c) The provisions of this section and section 1379 of this title shall not apply with respect to the acquisition or holding by any air carrier, or any officer or director thereof, of (1) any interest in any ticket office, landing area, hangar, or other ground facility reasonably incidental to the performance by such air carrier of any of its services, or (2) any stock or other interest or any office or directorship in any person whose principal business is the maintenance or operation of any such ticket office, landing area, hangar, or other ground facility.

Jurisdiction of Accounts of Noncarriers

(d) Whenever, after the effective date of this section, a person, not an air carrier, is authorized, pursuant to this section, to acquire control of an air carrier, such person thereafter shall, to the extent found by the Board to be reasonably necessary for the administration of this chapter, be subject, in the same manner as if such person were an air carrier, to the provisions of this chapter relating to accounts, records, and reports, and the inspection of facilities and records, including the penalties applicable in the case of violations thereof.

Investigation of Violations

(e) The Board is empowered, upon complaint or upon its own initiative, to investigate and, after notice and hearing, to determine whether any person is violating any provision of subsection (a) of this section. If the Board finds after such hearing that such person is violating any provision of such subsection, it shall by order require such person to take such action, consistent with the provisions

of this chapter, as may be necessary, in the opinion of the Board, to prevent further violation of such provision. Pub. L. 85-726, Title IV, § 408, Aug. 23, 1958, 72 Stat. 767; Pub.L 86-758, § 1, Sept. 13, 1960, 74 Stat. 901.

Presumption of Control; Beneficial Ownership

(f) For the purposes of this section, any person owning beneficially 10 per centum or more of the voting securities or capital, as the case may be, of an air carrier shall be presumed to be in control of such air carrier unless the Board finds otherwise. As used herein, beneficial ownership of 10 per centum of the voting securities of a carrier means ownership of such amount of its outstanding voting securities as entitled the holder thereof to cast 10 per centum of the aggregate votes which the holders of all the outstanding voting securities of such carrier are entitled to cast. As amended Pub.L. 91-62, § 1(2), (3) (A), Aug. 20, 1969, 83 Stat. 103, 104.

Federal Aviation Act 1958, as amended, 49 U.S.C. § 1301 *et seq.*

§ 409, 49 U.S.C. § 1379

Prohibited interests; interlocking relationships; profit from transfer of securities

(a) It shall be unlawful, unless such relationship shall have been approved by order of the Board upon due showing, in the form and manner prescribed by the Board, that the public interest will not be adversely affected thereby—

(1) For any air carrier to have and retain an officer or director who is an officer, director, or member, or who as a stockholder holds a controlling interest, in any other person who is a common carrier or is engaged in any phase of aeronautics.

(2) For any air carrier, knowingly and willfully, to have and retain an officer or director who has a representative or nominee who represents such officer or director as an officer, director, or member, or as a stockholder holding a controlling interest, in any other person who is a common carrier or is engaged in any phase of aeronautics.

(3) For any person who is an officer or director of an air carrier to hold the position of officer, director, or member, or to be a stockholder holding a controlling interest, or to have a representative or nominee who represents such person as an officer, director, or member, or as a stockholder holding a controlling interest, in any other person who is a common carrier or is engaged in any phase of aeronautics.

(4) For any air carrier to have and retain an officer or director who is an officer, director, or member, or

who as a stockholder holds a controlling interest, in any person whose principal business, in purpose or in fact, is the holding of stock in, or control of, any other person engaged in any phase of aeronautics.

(5) For any air carrier, knowingly and willfully, to have and retain an officer or director who has a representative or nominee who represents such officer or director as an officer, director, or member, or as a stockholder holding a controlling interest, in any person whose principal business, in purpose or in fact, is the holding of stock in, or control of, any other person engaged in any phase of aeronautics.

(6) For any person who is an officer or director of an air carrier to hold the position of officer, director, or member, or to be a stockholder holding a controlling interest, or to have a representative or nominee who represents such person as an officer, director, or member, or as a stockholder holding a controlling interest, in any person whose principal business, in purpose or in fact, is the holding of stock in, or control of, any other person engaged in any phase of aeronautics.

(b) It shall be unlawful for any officer or director of any air carrier to receive for his own benefit, directly or indirectly, any money or thing of value in respect of negotiation, hypothecation, or sale of any securities issued or to be issued by such carrier, or to share in any of the proceeds thereof. Pub.L. 85-726, Title IV, § 409, Aug. 23, 1958, 72 Stat. 768.

Federal Aviation Act 1958, as amended, 49 U.S.C. § 1301 *et seq.*

§ 411, 49 U.S.C. § 1381

Methods of competition

The Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier, foreign air carrier, or ticket agent is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier, foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition. Pub.L. 85-726, Title IV, § 411, Aug. 23, 1958, 72 Stat. 769.

Federal Aviation Act 1958, as amended, 49 U.S.C. § 1301 *et seq.*

§ 412, 49 U.S.C. § 1382

Pooling and other agreements; filing, approved by Board

(a) Every air carrier shall file with the Board a true copy, or, if oral, a true and complete memorandum, of every contract or agreement (whether enforceable by provisions for liquidated damages, penalties, bonds, or otherwise) affecting air transportation and in force on the effective date of this section or hereafter entered into, or any modification or cancellation thereof, between such air carrier and any other air carrier, foreign air carrier, or other carrier for pooling or apportioning earnings, losses, traffic, service, or equipment, or relating to the establishment of transportation rates, fares, charges, or classifications, or for preserving and improving safety, economy, and efficiency of operation, or for controlling, regulating, preventing, or otherwise eliminating destructive, oppressive, or wasteful competition, or for regulating stops, schedules, and character of service, or for other cooperative working arrangements.

(b) The Board shall by order disapprove any such contract or agreement, whether or not previously approved by it, that it finds to be adverse to the public interest, or in violation of this chapter, and shall by order approve any such contract or agreement, or any modification or cancellation thereof, that it does not find to be adverse to the public interest, or in violation of this chapter; except that the Board may not approve any contract or agreement between an air carrier not directly engaged in the operation of aircraft in air transportation and a common carrier

subject to the Interstate Commerce Act, as amended, governing the compensation to be received by such common carrier for transportation services performed by it. Pub. L. 85-726, Title IV, § 412, Aug. 23, 1958, 72 Stat. 770.

Federal Aviation Act 1958, as amended, 49 U.S.C. § 1301 *et seq.*

§ 414, 49 U.S.C. § 1384

Legal restraints

Any person affected by any order made under sections 1378, 1379, or 1382 of this title shall be, and is hereby, relieved from the operations of the "antitrust laws", as designated in section 12 of Title 15, and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order. Pub. L. 85-726, Title IV, § 414, Aug. 23, 1958, 72 Stat. 770.

Federal Aviation Act 1958, as amended, 49 U.S.C. § 1301 *et seq.*

§ 1002(j), 49 U.S.C. § 1482(j)

Complaints to and investigations by the Administrator and the Board

(j) (1) Whenever any air carrier or foreign air carrier shall file with the Board a tariff stating a new individual or joint (between air carriers, between foreign air carriers, or between an air carrier or carriers and a foreign air carrier or carriers) rate, fare, or charge for foreign air transportation or any classification, rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, the Board is empowered, upon complaint or upon its own initiative, at once, and, if it so orders, without answer or other formal pleading by the air carrier or foreign air carrier, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, or charge, or such classification, rule, regulation, or practice; and pending such hearing and the decision thereon, the Board, by filing with such tariff, and delivering to the air carrier or foreign air carrier affected thereby, a statement in writing of its reasons for such suspension, may suspend the operation of such tariff and defer the use of such rate, fare, or charge, or such classification, rule, regulation, or practice, for a period or periods not exceeding three hundred and sixty-five days in the aggregate beyond the time when such tariff would otherwise go into effect. If, after hearing, the Board shall be of the opinion that such rate, fare, or charge, or such classification, rule, regulation, or practice, is or will be unjust or unreasonable, or unjustly discriminatory, or unduly preferential, or unduly prejudicial, the Board may take action to reject or cancel such tariff and prevent the use of such rate, fare, or charge, or such classification, rule, regulation, or practice. The Board may at any time rescind the suspension of such tariff and permit the use of such rate, fare, or charge, or such classification, rule, regulation, or practice. If the proceeding has not been concluded and an order made within the period of suspension or suspensions, or if the Board shall otherwise so direct, the proposed rate, fare, charge, classification, rule, regulation, or practice shall go into effect subject, however, to being canceled when the proceeding is concluded. This paragraph shall not apply to any initial tariff filed by an air carrier or foreign air carrier. During the period of any suspension or suspensions, or following rejection or cancellation of a tariff, including tariffs which have gone into effect provisionally, the affected air carrier or foreign air carrier shall maintain in effect and use the rate, fare, or charge, or the classification, rule, regulation, or practice affecting such rate, fare, or charge, or the value of service thereunder, which was in effect immediately prior to the filing of the new tariff.

(2) With respect to any existing tariff of an air carrier or foreign air carrier stating rates, fares, or charges for foreign air transportation, or any classification, rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, the Board is empowered, upon complaint or upon its own initiative, at once and, if it so orders, without answer or other formal pleading by the air carrier or foreign air carrier, but upon reasonable notice, to enter into a hearing concerning the lawfulness of such rate, fare, or charge, or such classification, rule, regulation, or practice; and pending such hear-

ing and the decision thereon, the Board, upon reasonable notice, and by filing with such tariff, and delivering to the air carrier or foreign air carrier affected thereby, a statement in writing of its reasons for such suspension, and the effective date thereof, may suspend the operation of such tariff and defer the use of such rate, fare, or charge, or such classification, rule, regulation, or practice, following the effective date of such suspension, for a period or periods not exceeding three hundred and sixty-five days in the aggregate from the effective date of such suspension. If, after hearing, the Board shall be of the opinion that such rate, fare, or charge, or such classification, rule, regulation, or practice, is or will be unjust or unreasonable, or unjustly discriminatory, or unduly preferential, or unduly prejudicial, the Board may take action to cancel such tariff and prevent the use of such rate, fare, or charge, or such classification, rule, regulation, or practice. If the proceeding has not been concluded within the period of suspension or suspensions, the tariff shall again go into effect subject, however, to being canceled when the proceeding is concluded. For the purposes of operation during the period of such suspension, or the period following cancellation of an existing tariff pending effectiveness of a new tariff, the air carrier or foreign air carrier may file a tariff embodying any rate, fare, or charge, or any classification, rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, that may be currently in effect (and not subject to a suspension order) for any air carrier engaged in the same foreign air transportation.

(3) Whenever the Board finds that the government or aeronautical authorities of any foreign country have refused to permit the charging of rates, fares, or charges contained in a properly filed and published tariff of an air carrier filed under this chapter for foreign air transportation to such foreign country, the Board may, without hearing, (A) suspend the operation of any existing tariff of any foreign air carrier providing services between the United States and such foreign country for a period or periods not exceeding three hundred and sixty-five days in the aggregate from the date of such suspension, and (B) during the period of such suspension or suspensions, order the foreign air carrier to charge rate, fares, or charges which are the same as those contained in a properly filed and published tariff (designated by the Board) of an air carrier filed under this chapter for foreign air transportation to such foreign country, and the effective right of an air carrier to start or continue service at the designated rates, fares, or charges to such foreign country shall be a condition to the continuation of service by the foreign air carrier in foreign air transportation to such foreign country.

(4) The provisions of this subsection and compliance with any order of the Board issued pursuant thereto shall be an express condition to the certificates or permits now held or hereafter issued to any air carrier or foreign air carrier, and the maintenance of rates, fares, or charges in conformity with the requirements of such provisions and such order of the Board shall be a condition to the continuation of the affected service by such air carrier or foreign air carrier.

(5) In exercising and performing its powers and duties under this subsection with respect to the rejection or cancellation of rates for the carriage of persons or property,

the Board shall take into consideration, among other factors—

(A) the effect of such rates upon the movement of traffic;

(B) the need in the public interest of adequate and efficient transportation of persons and property by air carriers and foreign air carriers at the lowest cost consistent with the furnishing of such service;

(C) such standards respecting the character and quality of service to be rendered by air carriers and foreign air carriers as may be prescribed by or pursuant to law;

(D) the inherent advantages of transportation by aircraft;

(E) the need of such air carrier and foreign air carrier for revenue sufficient to enable such air carrier and foreign air carrier, under honest, economical, and efficient management, to provide adequate and efficient air carrier and foreign air carrier service; and

(F) whether such rates will be predatory or tend to monopolize competition among air carriers and foreign air carriers in foreign air transportation.

As amended Pub.L. 92-259, § 3(a), Mar. 22, 1972, 86 Stat 96.

The Clayton Act, 15 U.S.C. § 12 *et seq.*

§ 16, 15 U.S.C. § 26

Injunctive relief for private parties; exception

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided,* That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.

Oct. 15, 1914, c. 323, § 16, 38 Stat. 737.

The Opinion of the United States Court of Appeals for the Ninth Circuit

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 74-2463

FOREMOST INTERNATIONAL TOURS, INC.,

Plaintiff-Appellee,

vs.

QANTAS AIRWAYS LIMITED, DOE ONE through DOE TEN, Inclusive,

Defendants-Appellants.

[October 22, 1975]

On Appeal from the United States District Court for the District of Hawaii

Before:

BARNES, KILKENNY and GOODWIN,

Circuit Judges.

BARNES, *Senior Circuit Judge:*

Plaintiff-Appellee Foremost International Tours, Inc., is a wholesaler of tour programs. Its business consists of arranging for and putting together the necessary elements of land and air transportation, hotel accommodations, car rentals, sightseeing excursions, and so forth, to create a fully inclusive tour package, and then in operating, over-

seeing and selling these tours. Foremost markets its tour programs through retail outlets including travel agents and the ticket offices of those airlines which sponsor or participate in providing the air transportation phase of the tour in question.

Defendant-Appellant Qantas is a foreign air carrier, which up until March 31, 1974, was a participating airline in one of Foremost's tours. On November 7, 1973, Qantas informed Foremost that it would not renew its annual contract (expiring March 31, 1974) with Foremost to provide air transportation for Foremost's "Royal Road Tours"; and on April 1, 1974, Qantas extended its operations and itself entered the business of producing and selling an integrated tour package in competition with Foremost.

Foremost subsequently brought this antitrust action against Qantas alleging violations of sections 1 and 2 of the Sherman Act, and complaining that the conduct of Qantas surrounding its entrance into the inclusive tour industry showed a clear intent to monopolize the inclusive tour industry, and was undertaken with predatory intent, and with the purpose of eliminating Foremost as a competitor in the market. (C.T. 11-12).

The District Court found that Foremost was faced with being irreparably injured (its very existence was endangered—see, finding 18, C.T. 492), and that the actions taken by Qantas in its vertical-conglomerate expansion into the tour business established a *prima facie* violation of the antitrust laws (379 F. Supp. 88, 97, D. Haw. 1974). Consequently, the District Court issued a preliminary injunction against Qantas enjoining it from engaging in certain proscribed conduct in its operation of competing integrated

tours. However, since many issues involved in the case[1] are matters affecting the air transportation industry regulated by the Civil Aeronautics Board (hereinafter CAB) the district judge, while retaining jurisdiction, stayed further proceedings in the District Court until the CAB could consider those matters which were in its primary jurisdiction.

Qantas appeals from the issuance of the preliminary injunction. We summarize the issues appellant raises as follows: (1) whether it was appropriate for the District Court to issue a preliminary injunction when: (a) the subject matter was arguably within the primary jurisdiction of the CAB; (b) the CAB arguably could have provided under the suspension power of 49 U.S.C. § 1482(j)(2) the prophylactic relief sought by Foremost, and (c) the provisions of § 414 of the Federal Aviation Act, 49 U.S.C. § 1384 (granting a limited antitrust immunity to various acts approved by the CAB); and (2) regardless of the outcome of the first issue, whether the requirements for the issuance of the preliminary injunction were met in this case at all.

This court has appellate jurisdiction under 28 U.S.C. § 1292(a)(1).

We affirm.

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[1] As examples of such issues the District Court listed: "whether an airline such as Qantas may conduct an in-house tour operation, whether the acts of Qantas alleged in the complaint constitute unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof and whether the acts of Qantas alleged in the complaint have anticompetitive effects."

Another example of this sort of issue would be whether by means of improper accounting methods relating to fixed cost allocation and translation of foreign exchange rates. Quantas was violating its tariff and illegally subsidizing its land tour operations with air fare revenues.

Were this an antitrust case where the anticompetitive effects of the complained of action were *confined* to, and primarily affected, the regulated industry, *and* the regulatory agency had the power and authority to protect the status quo, should it deem it necessary, by issuing a cease and desist order, we would then agree with appellant that in issuing a preliminary injunction the District Court would be acting contrary to the intent of Congress when it established regulatory agencies to provide pervasive, coordinated, and uniform administration of an industry. These are the basic principles enunciated by the Supreme Court in *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1962). But this is *not* such a case.

The instant case is not the normal type of case where the District Court's jurisdiction and the regulatory jurisdiction of an administrative agency conflict. In the usual case, we face one of two situations: (1) where one firm in a regulated industry is suing another firm in the same regulated industry over some intra-industry squabble relating to unfair competition, violation of some regulatory rule, territory allocation, horizontal agreements, or some other wholly intra-industry problem within the jurisdiction of the regulatory agency,[2] or (2) when the consumers of the regulated industry's product or service are objecting to the effects upon the quality, availability, or cost of the goods or service due to intra-industry combinations (*i.e.*, price

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[2] *See, e.g., Allied Air Freight* v. *Pan Am. World Airways, Inc.*, 393 F.2d 441 (2d Cir.), *cert. denied*, 393 U.S. 846 (1968); *S.S.W., Inc.* v. *Air Transport Ass'n of Am.*, 191 F.2d 658 (D.C. Cir. 1951); *Trans-Pacific Airlines, Ltd.* v. *Hawaiian Airlines, Ltd.*, 174 F.2d 63 (9th Cir. 1949); *cf. DHL Corp.* v. *Loomis Courier Service, Inc.*, —— F.2d —→ (9th Cir. 1975) [decided 8/7/75].

fixing, territory allocation, etc.), the regulation of which is also wholly within the province of the administrative agency.[3]

In those cases where the complained of action has an anticompetitive effect primarily confined to the regulated industry in question (including necessarily the effect on its consumers who are those primarily affected by any anti-competitive influences in the industry) and where the anti-competitive effects arise from regulation, conduct, accords, agreements, etc., which are wholly of an intra-industry nature, the only appropriate course of action for a district court to take when faced with a conflict between regulatory agency jurisdiction over these matters, and the court's own antitrust jurisdiction is: (1) to dismiss the antitrust action and refrain from itself acting until a review of the agency's determination of the matter comes before it, or (2) in the event that the agency does not have sufficient means to provide the full panoply of antitrust remedies sought, stay the proceedings in the District Court unitl after the regulatory agency has acted. *See Pan American* v. *United States, supra,* at 313 n.19; Report of the Attorney General's National Committee to Study the Antitrust Laws, 282 (1955).

The purpose of the *Pan Am* Rule is that when a regulatory agency has pervasive authority and the ability and expertise to exercise coordinated control over an entire industry and over all facets of that industry's industrial behavior, the agency having this overview of the entire

[3] *See, e.g., Price* v. *Trans World Airlines, Inc.,* 481 F.2d 844 (9th Cir. 1973); *Laveson* v. *Trans World Airlines, Inc.,* 471 F.2d 76 (3rd Cir. 1972); *Nader* v. *Allegheny Airlines, Inc.,* —— F.2d —— (D.C. Cir. 1975) [U.S.L.W. 2458].

industry is in the better position to resolve wholly intra-industry problems, and, being more attuned to the problems of the whole industry, better able to formulate and implement remedies which are flexible and deal with *all* of the intra-industry ramifications of an intra-industry problem. Whether this purpose is always achieved is sometimes in doubt. In essence, it reflects a congressional determination that continuing regulation is a better calibrated tool for dealing with and controlling anti-competitive behavior within an industry than the more blunt and generalized instrument of the antitrust laws. Agencies, because their interests are narrowed and fixed on one industry, may be better able to balance the competing interests within the industry and the welfare of the consumers of the industry's service or product. In light of these factors, the District Court is to refrain from immediate or hasty interference in intra-industry problems of industries subject to the control of a regulatory agency, until the regulatory agency has had an opportunity to carry out the functions for which it was initially created by Congress. The policy more simply stated is that when a matter is wholly an intra-industry problem the agency created to regulate that industry should initially determine that problem.

Where, however, the antitrust problem facing the court is not wholly confined to the regulated industry, other factors and policy considerations may substantially alter the desirability of according such substantial deference to an agency which does not have a perspective broader than its own industry, or the interest, expertise, power, or willingness to deal with an inter-industry problem.

Even were this a case where a firm in a regulated industry entered into a business not regulated by the

regulatory agency in question or vice versa (where a firm in an industry not regulated by the agency in question enters the regulated industry), and by either entry creates anticompetitive effects *confined* to the regulated industry, in such an instance the regulatory agency might still deserve to be accorded this same degree of deference since the agency still has an incentive to act because of the adverse economic effect on its own industry, and it would still have authority to act and the means to enforce its decisions due to its control over firms operating within the regulated industry. (*Cf. Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363 (1973).)

But in the instant case, the situation is different. Here we have Qantas, a firm engaged in a regulated industry, entering the tour industry, which is not *per se* regulated by the CAB, and its entry into this industry is alleged to have had an anticompetitive effect on the non-CAB-regulated tour industry. In this case, while the CAB has authority over Qantas, and arguably has the means to enforce an order against Qantas should it so choose, in lacking authority over all the parties, it cannot make the accommodations and effect the compromises which are the hallmark of agency regulation. It may well lack the means to deal with the total problem. But more importantly, the regulatory agency here also lacks the *expertise* and the *incentive* (—after all it is not its industry—) to act on an inter-industry problem. There is the danger that in cases such as this the regulatory agency might favor its own regulated industry at the expense of non-regulated commerce, or at the very least, might consider the resolution of such matters to be of a less pressing priority.

Where, as in the first of our examples, the complained of actions affect only intra-industry competition, and such anti-competitive actions (which would otherwise be outlawed), may, on approval by the regulatory agency, be thereby conferred a limited antitrust immunity, under statutes such as 49 U.S.C. § 1384, the reasoning, purpose and congressional intent behind such immunity statutes, being that integrated and pervasive regulation over an industry is thought of as a substitute for antitrust laws (*see* Report of the Attorney General's National Committee to Study the Antitrust Laws, 261-62 (1955)) makes them inapposite and inapplicable to cases such as the one now facing us which deal with inter-industry problems.

For instance, we do not think it would be seriously contended that the CAB could by its approval of a merger between an airline and a hotel chain, or by the memorialization of a resolution allowing airlines to go into the hotel business, legally permit an airline to monopolize the hotel business with impunity; nor if several airlines went into the hotel business, approve their dividing up of territories, or fixing prices in the hotel business. Neither do we think the CAB's approval of IATA Resolution 810 D & E permitting airlines to go into the tour business immunizes Qantas from an attempt (if proven) to monopolize the tour business over which the CAB in general has no control. The scope of the antitrust immunity which an agency's approval can confer under statutes such as 49 U.S.C. § 1384 was intended to be, and is, no broader than the industry regulated. *Butler Aviation Co.* v. *CAB*, 389 F.2d 517, 521 (2d Cir. 1968). A regulatory agency's approval of certain actions cannot confer antitrust immunity to those actions unless the primary anticompetitive effect those actions may have is limited to the industry in question.

Even though the CAB would not be able to "approve," and thereby grant immunity to acts having anticompetitive effects in an industry not regulated by the CAB, and even though the CAB does not have the expertise, incentive, or means to deal with all of the inter-industry ramifications of this problem, we do not imply that the District Court's action in staying its proceedings until the CAB reviewed the matter was erroneous. The fact that a regulated industry is involved and that some of the issues in this antitrust case deal with matters within the expertise of the regulatory agency, gives the CAB a substantial interest in this litigation, though not exclusive primary jurisdiction over it, since the matters are not confined to intra-industry effects. For example, a court may face a situation where a regulated firm's entrance into a business not regulated by the same agency has anticompetitive effects on firms both within and without the regulated industry, or, as in this case, where an agency's expertise may be a valuable aid to the court, or where the act complained of may constitute not only an un-immunizable antitrust violation, but also a violation of the regulatory agency's rules. In such situations, in the interest of comity and good judicial administration in seeking to interfere as little as possible with the workings of the regulatory agency, the courts should seek, if consistent with the interests of justice and the rights of injured parties not under the auspices of the agency, to stay its hand wherever possible to allow the regulatory agency to resolve the intra-industry aspects of the case first. But, in cases such as the instant case, where there is a substantial adverse effect on an industry not regulated by the agency in question, and in view of the reasons heretofore stated, the court should maintain its jurisdiction, and utilize its powers (including the issuance of preliminary injunctions), as it finds necessary.

In the case of *Wheelabrator Corp.* v. *Chafee,* 455 F.2d 1306 (D.C. Cir. 1971), the District of Columbia Circuit, facing a problem of overlapping agency and court jurisdiction, advanced an analogous accommodation between agency and judicial jurisdiction:

> "Plaintiff's application to the GAO in June did not preclude its subsequent application to the District Court, while the matter was still pending in GAO, for injunctive relief to prevent irreparable injury from the imminent bid opening. Under the doctrine of primary jurisdiction, a court may entertain an action for permanent relief and defer its consideration of the merits until an agency 'with special competence' in the field has ruled on the issues, if necessary maintaining the status quo pendente lite with injunctive relief avoiding irreparable injury pending such agency consideration. Brawner Building, Inc. v. Shehyn, 143 U.S.App. D.C. 125, 442 F.2d 847 (Feb 23, 1971). This doctrine has application to the General Accounting Office even assuming that its function is advisory since it has the special competence and experience that is the life and reason of the primary jurisdiction rule. Best v. Humboldt Placer Mining Co., 371 U.S. 334, 338, 83 S. Ct. 379, 9 L.Ed.2d 350 (1963); United States v. Western Pac. R. Co., 352 U.S. 59, 63-64, 77 S. Ct. 161, 1 L.Ed.2d 126 (1956). The court has the last word, but it can properly seek the benefit of whatever contributions can be made by an agency whose 'area of specialization' embraces problems similar to or inter-

meshed with those presented to the court. 3 K. Davis, Administrative Law Treatise § 19.09 at 53 (1958).

"The preliminary injunction by a court pending GAO determinations may provide a felicitous blending of remedies and mutual reinforcement of forums, since even the relatively expeditious GAO (fn. 13) may run into delays on decisions that undercut effectiveness of relief (see fn. 11). The preliminary injunction may be used to preserve the status quo and while securing for the court the benefit of the GAO's expertise. Where a court has warrant for issuing an injunction pending GAO determination it may be able to obviate the objection sometimes leveled at GAO's procedure, that the time required sometimes renders the matter moot prior to GAO's determination.

"In considering whether to extend a preliminary injunction, or issue a permanent injunction, against a procurement determination the court may properly take into account the GAO's concurrence in the executive determination, although the court does have the last word and should not shrink from exercise of its power when the conditions justify an injunction. Steinthal v. Seamans, 147 U.S.App. D.C. ——, 455 F.2d 1289, decided this day." (*Id.* at 1316-17.) (Footnote omitted.)

Having held that the District Court had jurisdiction to issue a preliminary injunction, we turn to the merits of the question of whether the court below should have issued the preliminary injunction on the facts of this case. Foremost needed to make a convincing showing on two points to be entitled to obtain a preliminary injunction against Qantas. First, that Foremost was being irreparably injured;[4] and second, that it is likely to prevail at trial on the merits. The opinion of the court below indicates to us the District Court had ample evidence to support each of these findings.[5] We do not find the District Court's granting of the preliminary injunction to be clearly erroneous.

We therefore *Affirm*.

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[4] We have exhausted every means of finding in the "cease and desist" provisions of 49 U.S.C. § 1381, a remedy as expeditious, fair, and equitable as that provided in the temporary injunction provisions of Rule 65 FRCivP.

The rules promulgated by the Civil Aeronautics Board implementing the provisions of § 1381, and other sections of Title 49 U.S.C. (14 C.F.R. § 302, *et seq.*) relating to proceedings before the C.A.B., are devoid of anything which would permit an administrative law judge or the board to expedite proceedings under § 1381. There is no provision for a *temporary* cease and desist order, nor is anything in the regulations which would permit the judge or the board to shorten the procedure in this type of proceeding. § 1381 requires notice and a hearing. § 302.35 C.F.R., providing for a "shortened procedure" in certain instances, is not applicable to § 1381, which requires a hearing. The procedures provided in C.F.R. 302.1301, *et seq.*, and 302.1401, *et seq.*, have no application to hearings under 49 U.S.C. § 1381. We are forced to conclude that Foremost might lose its entire business while attempting to get a cease and desist order under the mentioned statute.

[5] "18 In April 1973 Foremost sold 310 (passenger) tours; in April 1974, 102. In May 1973 Foremost sold 581 tours; in May 1974, 65. In June 1973 Foremost sold 539 tours, as of June 20, 1974, 29."

"21 Certain inquiries have been made by telephone of Qantas reservations staff in Honolulu since April 1, 1974, concerning Foremost's Royal Road Tours. On such occasions, Qantas reservations staff have furnished the person making the request with information relating to Qantas' Holiday Tours in the South Pacific rather than Foremost's Royal Road Tours. On at least one occasion Qantas switched a specific request for a Royal Road Tour to a Qantas Holiday Tour without informing the tour agent of the change."

Foremost International Tours, Inc. v. *Qantas, etc.*, 379 F. Supp. 88, 92 (1974), Findings 18 and 21.

The Opinion of the District Court
For the District of Hawaii

Civ. No. 74-116.

United States District Court,
D. Hawaii.

July 26, 1974.

FOREMOST INTERNATIONAL TOURS, INC.,
Plaintiff,

v.

QANTAS AIRWAYS LIMITED, Doe One through Doe Ten, Inclusive,
Defendants.

DECISION

PENCE, *District Judge.*

Founding its complaint upon past and present business activities between itself and Qantas Airways Limited (Qantas), as more fully set out hereafter, Foremost International Tours, Inc. (Foremost) has brought this antitrust action against Qantas.

Foremost alleges that Qantas violated Sections 1 and 2 of the Sherman Act and seeks monetary and injunctive relief under Sections 4 and 16 of the Clayton Act. 15 U.S.C. §§ 1, 2, 15, 26. This court has jurisdiction under 28 U.S.C. § 1331, 1337. The matter is presently before the court on Foremost's motion for a preliminary injunction and Qantas' cross-motion for summary judgment. Evidence has

been taken, and the preliminary issues have been argued and briefed.

Findings of Fact

1. Foremost is a corporation organized and existing under the laws of the State of Hawaii with its principal place of business in Honolulu, Hawaii.

2. Qantas is a public company incorporated in the State of Queensland, Australia, under the laws of the Commonwealth of Australia, with its principal place of business in Sydney, Australia.

3. Foremost is engaged in the business of packaging, producing and operating Royal Road Fly/Drive, Fly/Coach and Fly/Tour tour programs to Australia and New Zeland from the United States of America, Canada, and other areas. The relevant tour programs consist of (1) air transportation to Australia and New Zealand from the United States and Canada, and (2) a land portion of the tour consisting of hotel accommodations, sightseeing and land transportation in Australia and New Zealand.

4. Although no permit is on file with this court, it would appear that within the meaning of § 101(19) of the Federal Aviation Act of 1958, 49 U.S.C. § 1301(19), Qantas is the holder of a foreign air carrier permit issued by the Civil Aeronautics Board with the approval of the President of the United States pursuant to §§ 402 and 801 of the Federal Aviation Act of 1958, 49 U.S.C. §§ 1372, 1461, authorizing Qantas to engage in foreign air transportation between,

inter alia, the United States and Australia and New Zealand.

5. Prior to March 31, 1974, Foremost as tour producer and wholesaler and Qantas as the sponsoring airline, pursuant to agreement, conjoinedly marketed tour programs to Australia and New Zealand from the United States and Canada known as Royal Road Tours and which included Fly/Drive, Fly/Coach and Fly/Tour tours. Qantas furnished the air transportation and paid for, in part or sometimes all, directly or indirectly, advertising and promotional tour brochures for such tours. The brochures used were of distinctive format and colors. They were not protected by copyright. Foremost arranged for and operated the land portion of such tours.

6. The agreement pursuant to which Foremost and Qantas jointly marketed tour programs to Australia and New Zealand from the United States and Canada, known as Royal Road Tours and which included Fly/Drive, Fly/Coach and Fly/Tour tours, on its face appeared to be renewable annually at the sole option of Qantas. The annual term of the agreement was from April 1 to March 31. On November 7, 1973, Qantas verbally advised Foremost that the agreement would not be renewed beyond March 31, 1974 and subsequent written confirmation was given to Foremost by Qantas by letter dated December 13, 1973.

7. Foremost is a wholesaler of tour programs. Foremost does not sell its tour programs to the public directly but sells through retail outlets consisting of retail travel agents and ticket offices of those airlines who are sponsoring or

participating airlines in the tour programs produced by Foremost as a wholesaler.

8. Commencing April 1, 1974, Qantas commenced to market Fly/Drive, Fly/Coach, Fly/Tour and Fly/Rail tours to Australia and New Zealand from the United States and Canada through the in-house tour department of Qantas known as Qantas Holidays. The effect of this was to place Qantas, as an air carrier, in direct competition with Foremost in the marketing of such tour programs.

9. Foremost, as a wholesaler, after Qantas terminated their agreement, entered into an agreement with Air New Zealand effective April 1, 1974, whereby Air New Zealand became the sponsoring carrier of the Royal Road Tour programs packaged, produced, sold and operated by Foremost. Air New Zealand designated British Airways as a participating carrier in this tour program.

10. Qantas, commencing April 1, 1974, commenced selling its Fly/Drive, Fly/Coach, Fly/Tour, Fly/Rail tours from the United States and Canada to Australia and New Zealand directly through retail travel agent outlets and airline ticket office outlets, as well as sub-wholesalers. Its promotional brochures were almost identical in format and color to the 1973 brochures used by Foremost

11. In 1967 the International Air Transport Association (IATA) filed Resolution 810D with the Civil Aeronautics Board pursuant to § 412 of the Federal Aviation Act of 1958, 49 U.S.C. § 1382. Resolution 810D defines principles under which inclusive tours may be operated by IATA

members, such as is Qantas. IATA Resolution 810E contains rules applicable to tour operators such as Foremost who develop, organize and promote inclusive tours for sale by individual IATA travel agents via the scheduled services of IATA members such as Qantas. The IATA Resolutions 810D and 810E were approved by the Civil Aeronautics Board pursuant to § 412 of the Federal Aviation Act of 1958, 49 U.S.C. § 1382, on March 23, 1967 in Order No. E-24886 in Docket 17828.

12. As required by § 403 of the Federal Aviation Act of 1958, 49 U.S.C. § 1373, Qantas International Passenger Fares Tariff No. 3 was filed with and approved by the Civil Aeronautics Board, effective March 20, 1974. This tariff provides in pertinent part, with respect to South Pacific group inclusive tour fares, in Rule 82-A of said tariff, the following:

A. The tour must include in the published price and tour literature:

(1) Sleeping accommodation for the total duration of the tour in hotels, motels or commercially operated pensions;

(2) A program of sightseeing and/or entertainment features on at least half the number of days in the total trip.

B. The minimum selling price of the tour per passenger shall not be less than the applicable group inclusive tour fare plus U. S. $130 for the minimum stay plus $10 for each day of the tour in excess of the minimum stay for which tour features are provided.

The "minimum selling price" does but mean that when all properly allocable per-passenger costs of the tour are added up, that figure shall not fall below the $130 + $10 per excess day minimum of B, *supra.*

13. The group inclusive tour fare contained in Qantas' International Passenger Fares Tariff No. 3 is $674.10 between Sydney, Australia and West Coast points of the United States or Vancouver, Canada. Thus under Qantas' Tariff No. 3, Qantas cannot sell a South Pacific group inclusive 10-day tour for less than $ U.S. 674.10 + $130.00, viz., $804.10, even if the land portion should not "cost" Qantas $130.00.

14. Commencing April 1, 1974, Qantas has been selling a 10-day group inclusive tour to Australia at a price of $805. Although Qantas broke down the tour as "costing":

A. Air fare—$674.10

B. Land transportation in the form of car rental—$40.84

C. Hotel Accommodations—$59.40

D. Ten percent commission on the gross land cost to the retail agent—$13.90

E. Gross profit for Qantas on the gross land cost—$17.57,

items C and E are "as phony as a $3 bill." The "hotel" price was deliberately solicited and secured by Qantas for the sole purpose of fictitiously complying with the truth in advertising requirements of the Federal Trade Commis-

sion of the United States. By the terms of the hotel's letter to Qantas (Ex. D2), the room rate purportedly was limited by the hotel to one tour of 15 persons on a once only basis, but in fact it was never intended to be used or sold by either Qantas or the hotel, and Qantas never sold any such tour. The "profit" was nonexistent and fictitious. Qantas used it only to pro forma comply with the Federal Trade Commission requirements and as a "bait and switch" sales technique.

15. On all its tours, Qantas bases its cost figures on what it refers to as its "in-house" exchange rate: $A 1.00= $US 1.485. The actual rate of exchange, as quoted by the Bank of America in San Francisco on April 1, 1974, when the Qantas tours went on the market, was $A 1.00=$US 1.4925. It has remained virtually unchanged since that date.

16. Commencing April 1, 1974, Qantas has been selling a 14-day group inclusive tour to Australia at a price of $US 899.00. This encompasses the following (at Qantas' "in-house exchange rate"):

A. Air fare—$674.10

B. Land transportation in the form of car rental—$40.84

C. Hotel accommodations—$161.13

D. Ten percent commission on the gross land cost to the retail agent—$22.49

E. "Gross profit" on land portion of tour—44 cents.

If Bank of America exchange rates were used, a "loss" of 57 cents results.

17. Qantas does not allocate any of its overhead expenses, office administration, advertising or brochure expenses as "costs" in its representations to this court as to the "cost" of the land portion of any of its tours.

18. In April 1973 Foremost sold 310 (passenger) tours; in April 1974, 102. In May 1973 Foremost sold 581 tours; in May 1974, 65. In June 1973 Foremost sold 539 tours; as of June 20, 1974, 29.

19. Foremost as a tour wholesaler is not receiving any type of rebate, kickback or other form of payment in connection with its Royal Road Tour program being operated with Air New Zealand as the sponsoring airline.

20. Foremost pays a portion of the cost of promotional Air New Zealand Royal Road Tour brochures. It is required to pay for all trade advertising for its Royal Road Tours. Air New Zealand would provide national advertising.

21. Certain inquiries have been made by telephone of Qantas reservations staff in Honolulu since April 1, 1974, concerning Foremost's Royal Road Tours. On such occasions, Qantas reservations staff have furnished the person making the request with information relating to Qantas' Holiday Tours in the South Pacific rather than Foremost's Royal Road Tours. On at least one occasion Qantas switched a specific request for a Royal Road Tour to a Qantas Holiday Tour without informing the tour agent of the change.

22. The relevant market here involved is the packaging, producing, operating and marketing of "freewheeling" tours offered in conjunction with tour-basing airfares in tours from the United States and Canada to Australia and New Zealand. Freewheeling tours are without fixed itineraries but making hotel accommodations and local transportation available to the tour passenger. They are commonly called Fly/Drive, Fly/Coach, Fly/Tour or Fly/Rail travel programs.

I

Legal Analysis And Conclusions

This court is here faced with the recurrent and intricate task of applying the antitrust laws within a regulated industry, here the airlines. The five opinions rendered by the Supreme Court in the 1972-73 term have added all too little clarification to the confusion extant in the law on antitrust actions involving regulated industries.[1] *See* Robinson, Antitrust Developments: 1973, 74 Colum.L.Rev. 163 (1974). Defendant's motion for summary judgment is based on two arguments: (1) Qantas' entry into the South Pacific Fly/Drive inclusive tour market is exempt from the

[1] The Supreme Court applied the antitrust laws to a public utility and to a shipper in Otter Tail Power Co. v. United States, 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973), and Federal Maritime Comm'n v. Seatrain Lines, Inc., 411 U.S. 726, 93 S.Ct. 1773, 36 L.Ed.2d 620 (1973), respectively; deferred to the Civil Aeronautics Board in Hughes Tool Co. v. TWA, 409 U.S. 363, 93 S.Ct. 647, 34 L.Ed.2d 577 (1973); required the Federal Power Commission to consider antitrust policies in Gulf States Utilities Co. v. FPC, 411 U.S. 747, 93 S.Ct. 1870, 36 L.Ed.2d 635 (1973); and referred a conspiracy charge to the Commodity Exchange Commission for initial investigation in Ricci v. Chicago Mercantile Exchange, 409 U.S. 289, 93 S.Ct. 573, 34 L.Ed.2d 525 (1973).

operation of antitrust laws because authorized by an IATA resolution that was approved by the Civil Aeronautics Board (CAB). (2) Foremost's remaining claims, based upon unfair competition and deceptive practices, are within the primary jurisdiction of the CAB.

It is elementary that the Federal Aviation Act (Act) 49 U.S.C. § 1301 et seq., does not displace the antitrust laws in the air transportation industry. Pam American World Airways, Inc. v. United States, 371 U.S. 296, 304-305, 83 S.Ct. 476, 9 L.Ed.2d 325 (1963). The Act therefore does not automatically immunize the allegedly monopolistic acts of Qantas in this case. Even assuming that the CAB has "approved" the entry of Qantas into the inclusive tour business[2] and that Qantas met the minimum inclusive tour prices required by tariffs filed with the CAB, it would not be exempt from the antitrust laws. Section 414 of the Act provides that "any person affected by any order [affecting air transportation] shall be . . . relieved from the operations of the 'antitrust laws' . . . insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order." 49 U.S.C. § 1384.[3] The Supreme Court interpreted that pro-

[2] The evidence of "approval" is not entirely clear. Qantas cites IATA Resolution 810D (approved by CAB Order No. E-24598) as authorizing its entry into the inclusive tour business. This resolution is entitled "Inclusive Tours Initiated by Members". But the term "initiated" is nowhere defined nor is the effect of the "approval" anywhere outlined.

[3] Any person affected by any order made under sections 1378, 1379, or 1382 of this title shall be, and is hereby, relieved from the operations of the "antitrust laws", as designated in section 12 of Title 15, and of all other restraint or prohibitions made by, or imposed under, authority of law, insofar as may be

vision in Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363, 93 S.Ct. 647, 34 L.Ed.2d 577 (1973), which involved an antitrust claim that the airline had been injured by Hughes' control over the financing and flow of new aircraft to TWA. The Court found that the CAB had considered all of the prior dealings between the parties each time it had approved Hughes' acquisition of increased control over TWA; and, furthermore, that the agency had required Hughes to obtain its approval in connection with all significant purchase and sale transactions between the two companies. 409 U.S. at 379, 93 S.Ct. 647. The Court accordingly held that the CAB's specific actions conferred immunity upon the transactions in controversy. The Court emphasized that

> "from 1944 through 1960 every acquisition or lease of aircraft by TWA from Toolco and each financing of TWA by Toolco required Board approval. Each transaction was approved by the Board and each approval was an order under § 408, for the Board regarded its transactional orders as modifications or interpretations of its antecedent control order. Each of the modification orders recited a finding of the Board that the transactions were 'just and reasonable and in the public interest.'" *Ibid.*

While the entry of Qantas into the inclusive tour business and its pricing of tours according to tariffs might superfi-

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necessary to enable such person to do anything authorized, approved, or required by such order. 49 U.S.C. § 1384.

IATA Resolution 810D, which purports to approve the entry of airlines into the inclusive tour business, was filed with the CAB under section 412(a). This section requires every air carrier to file "agreements . . . affecting air transportation." 49 U.S.C. § 1382(a).

cially appear to come within the terms of the statute as "authorized" by a CAB order, the CAB never carefully scrutinized or particularized these acts as required by *Hughes Tool.* The CAB approved IATA resolution 810D in memorandum Order No. E-24598. This purports to authorize all airlines to enter the inclusive tour business. Since the order is dated January 3, 1967, and Qantas only commenced operating its own tours after April 1, 1974, the CAB could not possibly have considered the consequences of Qantas marketing its own tours in the Pacific market. Generally approving the entry of airlines into the inclusive tour business is a far cry from CAB's approval of "every acquisition or lease of aircraft by TWA from Toolco and each financing of TWA by Toolco," as in *Hughes Tool.*

Qantas' position that compliance with the minimum inclusive tour prices required by tariffs filed with the CAB exempts it from the operation of the antitrust laws is similarly untenable. Not only did the CAB approve 810D long before Qantas entered the inclusive tour market, but the CAB never analyzed the costings behind Qantas' land tour portions in its Fly/Drive tour prices charged the public. The relationship between the costs and the price of the land portion of the tours is a basis of this lawsuit. Since the CAB did not consider the costs of the land tour components to Qantas when it approved Qantas minimum tariff price, the agency scrutiny of the entry of Qantas into the inclusive Fly/Drive tour market and its pricing of tours was not sufficiently specific to immunize those transactions from the antitrust laws.

II

Although section 414 does not exempt Qantas from the operation of the antitrust laws, this court concludes

that entry of Qantas into the inclusive tour business and its below cost pricing practice, switching of tours, as well as the other charges of anticompetitive activity—terminating a business relationship, obtaining confidential information, imitating Foremost's brochures, boycotting, tyings, and dividing the market—are within the initial jurisdiction of the CAB under section 411. 49 U.S.C. § 1381.[4] That section provides that the CAB may, "upon its own initiative or upon complaint by any . . . ticket agent, . . . investigate and determine whether any . . . foreign air carrier . . . has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof."

Section 101 defines "Ticket agent" as "any person . . . who . . . negotiates for, or holds himself out by solicitation, advertisement, or otherwise as one who sells, provides, furnishes, contracts or arranges for, such transportation." 49 U.S.C. § 1301 (34). Foremost brochures state that:

> Yes, ROYAL ROAD TOURS were first to provide a Fly/Drive Tour in the South Pacific and continue to be first by offering once again, the popular Fly/Drive Tour to Australia FOR MUCH LESS than the normal air fare alone.
>
> • • •
>
> The Standard Fly/Drive Tour not only provides the roundtrip flight to Sydney with arrival transfer [etc.].

[4] The Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier, foreign air carrier, or ticket agent is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier, foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition. 49 U.S.C. § 1381.

With its own brochure, Foremost purports to "arrange for" air transportation. Foremost is thus a ticket agent within the meaning of the statute and therefore has standing to file a complaint with the CAB against Qantas.

While the CAB's jurisdiction under section 411 includes the authority to investigate "unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof", Foremost argues that the CAB is not empowered to regulate the land tour business because it is not encompassed within the meaning of the phrase "air transportation or the sale thereof." Neither the legislative history of the Act nor the CAB's regulations crystallizes the meaning of that phrase.[5] The essence of plaintiff's complaint is that Qantas has subsidized the land portion of its below cost inclusive tours with profits from the sale of its airline seats. In this case, since Qantas'

[5] The CAB regulates inclusive tours. *See* 14 C.F.R. § 378 (1974). However, except for the provision that a Tour Prospectus be filed with the CAB, *id.* 378.10, the requirements of Part 378 govern "tour operators" and "foreign tour operators". Qantas is not a foreign tour operator within the meaning of that section, *id.* § 378.2(d-1), and, therefore, not directly governed by § 378.12, which prohibits tour operators and foreign tour operators from engaging in "unfair or deceptive practices or unfair methods of competition." However, this court will not impute to Congress or to the CAB the anomaly of regulating under the Federal Aviation Act, tours operated by non-airlines, while ignoring the excesses of airline tour operators.

sales of the land tours and the air passage are deliberately intermixed, both should come within the meaning of the phrase "air transportation or the sale thereof." This court holds that the CAB has jurisdiction of such allegations in Foremost's complaint.

With the scope of the CAB's power in mind, this court therefore follows the course set by The Court in Ricci v. Chicago Mercantile Exchange, 409 U.S. 289, 93 S.Ct. 573, 34 L.Ed.2d 525 (1973). It will exercise antitrust jurisdiction over the parties' controversy but stay most proceedings thereunder pending CAB's determination of Foremost's complaint before the CAB.[6] In *Ricci*, a member on a commodities exchange alleged that another trader and the exchange itself unlawfully conspired to deprive him of his membership. The Court held that, although the Commodity Exchange Act did not unambiguously provide Ricci with an opportunity to seek complete redress, *Id.* at 304, 93 S.Ct. 573, the complaint should first be referred to the agency, stating:

> "This judgment rests on three related premises: (1) that it will be essential for the antitrust court to determine whether the Commodity Exchange Act or any of its provisions are 'incompatible with the maintenance of an antitrust action,' Silver v. New York Stock Exchange, [373 U.S. 341, 358, 83 S.Ct. 1246, 1257, 10 L.Ed.2d 389 (1963)]; (2) that some facets of the dispute between Ricci and the Exchange are within the statutory jurisdiction of the Commodity Exchange Commission; and (3) that adjudication of that dispute by the Commission promises to be of material aid in resolving the immunity question." *Id.* at 302, 93 S.Ct. at 580.

[6] In Pan American World Airways, Inc. v. United States, 371 U.S. 296, 83 S.Ct. 476, 9 L.Ed.2d 325 (1963), the Supreme Court held that courts should dismiss complaints presenting questions entrusted by Congress to the CAB. However, in light of The Court's applying the Sherman Act to a public utility's refusal to sell power at wholesale in *Otter Tail*, and its referring an alleged conspiracy to the Commodity Exchange Act in *Ricci*, if *Pan American* were decided today, this court, too, concludes that The Court would refer the dispute to the CAB for a preliminary determination rather than dismiss the action outright. *Cf.* Robinson, *supra*, at 178.

Ricci points out that, in certain instances, courts are unable, without agency expertise, to minimize conflicts between regulatory statutes and the antitrust laws. This rationale thus compels referral of the instant case to the CAB. Many of Foremost's charges of anticompetitive activity by Qantas, especially its entry into the inclusive tour market and its subsidizing of the land tour portions with profits from airline seats, are eminently within the CAB's expertise. Operation and sale of inclusive tours by airlines and subsidizing this portion of their operation in order to sell more seats might well be in the public interest. Vertical expansion apparently has lowered the costs of tours to the public and mayhap should be encouraged. Other airlines might also vertically expand and compete with Qantas, thus adequately protecting the public. This court feels that it would be better equipped to make the determinations necessary under the antitrust aspects of this case with some enlightenment from the CAB.

This procedure does not prejudice Foremost. Should the CAB determine that Foremost is not a "ticket agent" within the meaning of the Act, or that the inclusive tour

business is not within the scope of the CAB's jurisdiction, or should refrain from action for any reason, this court would, of course, then undertake to decide the complex problems of vertical expansion and subsidies in the airline industry, and their actual or possible antitrust implications without CAB assistance.

III

This court is aware of the language in *Pan American, supra,* that section 411 of the Act leaves to the CAB questions of injunctive relief in certain areas. 371 U.S. at 310, 83 S.Ct. 476. However, underlying this interpretation is the conclusion that if "courts . . . intrude independently with their construction of the antitrust laws, two regimes might collide." *Ibid.* Neither the Act nor the regulations appear to authorize the CAB to grant the preliminary relief Foremost seeks.[7] Since a preliminary in-

[7] In 1972, Congress vested the CAB with specific authority to suspend or reject the tariffs of foreign air carriers. Act of Mar. 22, 1972, 86 Stat. 96, Pub.L. 92-259. Thus, the CAB has jurisdiction to grant preliminary relief against foreign air carriers in certain instances:

> With respect to any existing tariff of an air carrier or foreign carrier stating rates, fares, or charges for foreign air transportation, . . . the Board . . . may suspend the operation of such tariff . . . for a period . . . not exceeding three hundred and sixty-five days. . . . 49 U.S.C. § 1482(j)(2).

However, it does not appear that the CAB has jurisdiction under this section to suspend the inclusive tour fares of Qantas. The statute resulted from Lufthansa's low proposed excursion air fare. 1972 U.S. Code Cong. & Admin. News pp. 2100, 2101. The House Report states that the "legislation is, however, strictly limited in its scope and does not pretend to solve all of the ills and problems of international air transportation." *Id.* at p. 2102. More specifically, the Report further states that the bill applies to "charges for foreign air transportation." *Id.* at p. 2103. The Report nowhere discussed inclusive tour fares. Therefore, the CAB can only deal with the allegations in Foremost's complaint by issuing a cease and desist order under § 1381.

In the event the CAB interprets broadly its jurisdiction under § 1482(j) and suspends or modifies Qantas' inclusive tour fares, this court would then terminate any portions of the preliminary injunction thus jointly acted upon. This procedure satisfies the rule of *Pan American* that courts are to avoid interfering with the CAB.

junction by this court does not interfere with the CAB's jurisdiction, *Pan American* does not preclude giving the limited injunctive relief herein sought. Just as litigants may sue for damages alleged to have occurred by reason of antitrust violations of the kind with which the CAB has authority to deal only by issuing a cease and desist order, Aloha Airlines, Inc. v. Hawaiian Airlines, Inc., 489 F.2d 203, 208 (9th Cir. 1973), antitrust litigants are entitled to preliminary injunctions when warranted by law and fact. Cf. Arrow Transportation Co. v. Southern Railway Co., 372 U.S. 658, 83 S.Ct. 984, 10 L.Ed.2d 52 (1963).

The danger that Foremost will suffer irreparable injury before the CAB has investigated the charges of deceptive practices and unfair methods of competition is very real. Foremost has established that the existence of its business life as a competitor in the freewheeling tour market is threatened. This is a sufficient showing of irreparable injury to warrant a preliminary injunction even though the amount of direct financial harm might be ascertainable. Semmes Motors, Inc. v. Ford Motor Co., 429 F.2d 1197, 1205 (2d Cir. 1970) (per Friendly, *J.*); 11 C. Wright & A. Miller § 2948 at 440 (1973). Courts should be particularly concerned with threats to the existence of a moving party's business in the area of antitrust. An award of

only money damages in lieu of preserving a competitor disserves the public interest.

Qantas argues that Foremost has not demonstrated that it is suffering irreparable harm as a result of Qantas' conduct. It argues that Foremost's injury results solely from the depression in the airline and tour industry: fewer people are traveling from the United States to the South Pacific. However, a plaintiff seeking relief under Section 16 of the Clayton Act need not show actual injury caused by defendant's anticompetitive conduct. He "need only demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur (citations omitted)." Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130, 89 S.Ct. 1562, 1580, 23 L.Ed.2d 129 (1969). Since Qantas' below cost pricing and other anticompetitive actions establish a prima facie violation of the antitrust laws,[8] Foremost need not now prove that its present loss

[8] Entirely distinct from monopolization, § 2 of the Sherman Act may be violated by an attempt to monopolize, even though the desired end of monopoly power is not attained. *See* American Bar Ass'n, Antitrust Developments 1955-1968 (1968) at 37. Plaintiffs need only prove a specific intent to monopolize and the dangerous probability of success. *See, e.g.*, Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 626, 73 S.Ct. 872, 97 L.Ed. 1277 (1953); American Tobacco Co. v. United States, 328 U.S. 781, 785, 66 S.Ct. 1125, 90 L.Ed. 1575 (1946); Cornwell Quality Tools Co. v. C. T. S. Co., 446 F.2d 825, 832 (9th Cir. 1971), cert. denied, 404 U.S. 1049, 92 S.Ct. 715, 30 L.Ed.2d 740 (1972).

Since intent to monopolize can be proved by direct evidence only in rare instances, plaintiffs must establish the requisite intent with circumstantial evidence. Foremost has made an unrebutted prima facie showing that Qantas is marketing tours below cost. Below cost pricing may be evidence of violations of the antitrust laws. Bergjans Farm Dairy Co. v. Sanitary Milk Producers, 241 F.Supp. 476, 483 (E.D.Mo. 1965), aff'd, 368 F.2d 679 (8th Cir. 1966); *cf.* National Dairy Prods. Corp. v. United States, 350 F.2d 321, 330 (8th Cir. 1965), vacated and remanded on other grounds, 384 U.S. 883, 86 S.Ct. 1913, 16 L.Ed.2d 995 (1966). The evidence also establishes that, at least on one occasion, a Honolulu travel agent requested from Qantas a Foremost Royal Road Tour, but was given a Qantas Holidays Tour.

The evidence also satisfies the requirement of a dangerous probability of success. Qantas controls a significant portion of the per week seat capacities in the United States-South Pacific market, and is owned by the Australian government. With this leverage and its ability to absorb costings and overhead in its air fare, it poses as an awesome competitor in the inclusive tour market. The evidence also establishes that, by imitating Foremost's brochures of last year, Qantas is capitalizing on the good will accumulated by its former associate. While the evidence presented might not establish that Foremost will certainly prevail at trial, it clearly supports a preliminary injunction.

of business results from Qantas' activity. As a result of below cost pricing by Qantas, it follows that future passengers to the South Pacific will purchase Qantas tours rather than Foremost tours, and Foremost will be irreparably injured.

Foremost seeks to enjoin Qantas from operating any tours to Australia or New Zealand. However, this form of an injunction would unduly burden Qantas. Foremost is adequately protected by an order, inter alia, enjoining Qantas from selling its tours at prices that do not include all of the costs actually attributable to the land portions plus a reasonable allocation of its office administration and general overhead expenses and, further, prohibiting Qantas from shifting to itself business committed to or intended for Foremost.

ORDER

In accordance with the foregoing findings and conclusions, it is ordered, adjudged, and decreed that:

1. Foremost's Motion for a Temporary Injunction restraining and enjoining Qantas from operating an in-house tour program in the South Pacific tour market in competition with Foremost is Denied.

2. The matters alleged in the complaint relating to the questions whether an airline such Qantas may conduct an in-house tour operation, whether the acts of Qantas alleged in the complaint constitute unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof and whether the acts of Qantas alleged in the complaint have anticompetitive effects, are within the initial jurisdiction of the Civil Aeronautics Board under § 411 of the Federal Aviation Act of 1958, 49 U.S.C. § 1381. Further proceedings in this case in respect of these matters are stayed pending review, consideration, determination and findings by the CAB of these matters in accordance with § 411 of the Act.

3. The court retains jurisdiction of the alleged antitrust violations, including but not limited to alleged sales below cost, alleged shifting of tour requests, the alleged conspiracy with Canadian Pacific Airlines Limited and their alleged refusal to deal. The preceding is not to be interpreted as manifesting any intent by this court to restrict the scope of the CAB's investigation of and rulings upon any or all of the issues presented by Foremost's complaints. The motion of Qantas for dismissal of the complaint and summary judgment is Denied as to this aspect of the case.

4. Not enough evidence has been presented at this stage of the proceedings from which the court can conclude that there is a conspiracy with Canadian Pacific Airlines Limited

to monopolize or exclude Foremost from the South Pacific tour market or that Canadian Pacific Airlines has refused to deal with Foremost. Accordingly, no preliminary injunction shall issue with respect to these allegations in the complaint and Foremost's motion in that respect is Denied.

5. Pending final determination of this action, Qantas is hereby restrained and enjoined from selling inclusive "free-wheeling" tours until it has satisfied this court that the portion of the tour price applicable to the land costs includes not only the actual costs charged to Qantas for the land services, including ground and local air transportation services and hotel accommodation, but also generally including, but not limited to, administration expenses, office expenses, salaries, general in-house expenses and, possibly, advertising and brochure costs, related to Qantas' Holiday tours.

6. Pending final determination of this action,

(a) Qantas is hereby restrained and enjoined from continuing to advertise or otherwise offering for sale or selling any of its inclusive South Pacific tours, currently offered, at the prices now set forth in its tour brochures and other advertising media until it has satisfied this court that the land tour portion thereof meets and correctly reflects Qantas' costs, as set out in number 5, *supra,* and this court has approved the same.

(b) In implementing the above restraints,

(1) within 30 days after the effective date of this order, Qantas shall withdraw or otherwise nullify the current authenticity of all of its brochures that contain the above proscribed tour prices;

The Opinion of the District Court
For the District of Hawaii

(2) within 60 days after the effective date of this order, Qantas shall withdraw from its advertising in any news media any reference to the above proscribed tour prices.

7. Pending final determination of this action, Qantas is hereby restrained and enjoined from shifting or attempting to shift to Qantas Holiday Tours, passengers who have requested or otherwise sought to purchase a Foremost Royal Road Tour to the South Pacific.

8. Foremost is hereby required, pursuant to § 16 of the Clayton Act, 15 U.S.C. § 26, to give security in the sum of $1,000.00 for the payment of such costs and damages as may be incurred or suffered by Qantas if found to have been wrongfully enjoined, as a condition precedent to the entry into effect of the preliminary injunction to be entered herein.

9. The effective date of the preliminary injunction shall be stayed by this court for a period of ten days from the date of filing in this court to allow Qantas to apply to the United States Court of Appeals for the Ninth Circuit for a further stay pending appeal from the granting of the preliminary injunction.

Judgment of the United States Court of Appeals
For the Ninth Circuit

OFFICE OF THE CLERK

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

U. S. Court of Appeals and Post Office Building

7th & Mission Streets, P. O. Box 547

San Francisco, California 94101

Oct 22 1975

74-3463—Foremost International Tours, Inc. v.

Qantas Airways Limited, et al.

Dear Sir:

An opinion in the above case was filed today, and pursuant to Rule 36 of the Federal Rules of Appellate Procedure a Judgment was entered Oct 22 1975 Affirming the judgment or order of the court below (or administrative agency).

Pursuant to Rule 41(a) the mandate of this court will issue 21 days after the entry of judgment, unless the court enters an order otherwise, or grants a stay of the mandate or a petition for rehearing is filed. If a petition for rehearing is filed and denied, the mandate shall issue 7 days after the entry of the order denying the petition.

Very truly yours,

Clerk

U. S. Court of Appeals

Order of the United States Court of Appeals For the Ninth Circuit Denying Rehearing

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 74-2463

FOREMOST INTERNATIONAL TOURS, INC.,

Plaintiff-Appellee,

v.

QANTAS AIRWAYS LIMITED, DOE ONE through DOE TEN, Inclusive,

Defendants-Appellants.

Before:

BARNES, KILKENNY and GOODWIN,

Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing *en banc*.

The full Court has been advised of the suggestion for an *en banc* hearing, and no judge of the Court has requested a vote on the suggestion for rehearing *en banc*. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing *en banc* is rejected.

Complaint Filed in the District Court

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UNITED STATES DISTRICT COURT

DISTRICT OF HAWAII

Civil No. ———

COMPLAINT FOR DAMAGES AND FOR DECLARATORY AND INJUNCTIVE RELIEF

FOREMOST INTERNATIONAL TOURS, INC.

Plaintiff,

—vs.—

QANTAS AIRWAYS LIMITED, DOE ONE through DOE TEN, Inclusive,

Defendants.

Comes now Plaintiff and, demanding trial by jury, complains and alleges as follows:

Complaint Filed in the District Court

I

Jurisdiction and Venue

1. This complaint is filed and these proceedings are instituted against the named Defendants to recover damages and to secure declaratory and injunctive relief for violations of the antitrust laws as hereinafter alleged, pursuant to Sections 4 and 16 of the Clayton Act (15 U.S.C. 15, 26), Section 2201 of Title 28 of the United States Code and Rules 57 and 65 of the Federal Rules of Civil Procedure.

2. Defendant Qantas Airways Limited maintains an office, transacts business and is found within the District of Hawaii and is within the jurisdiction of this court for the purpose of service. Many of the acts done in violation of the antitrust laws as hereinafter alleged have been performed within the District of Hawaii, and the interstate and foreign commerce hereinafter described is carried on, in part, within the District of Hawaii.

II

Parties

3. Plaintiff Foremost International Tours, Inc., (hereinafter called "Foremost") is, and at all times herein mentioned was, a corporation organized and existing under the laws of the State of Hawaii, with its principal offices located in Honolulu, Hawaii. At all times mentioned in this complaint, Plaintiff has been engaged in the business of a wholesale tour operator.

Complaint Filed in the District Court

4. Defendant Qantas Airways Limited (hereinafter called "Qantas") is, and at all times herein mentioned was, a corporation organized and existing under the laws of the State of Queensland, Australia, and which maintains offices and transacts business within the District of Hawaii. Defendant is in the business of operating air transportation to and from the United States, and is certified as a foreign air carrier for that purpose by the United States Civil Aeronautics Board (hereinafter called "CAB"). Qantas operates approximately one-third of all airline seat capacity flown from the United States and Canada to Australia.

5. Defendants Doe One through Doe Ten, inclusive, are sued herein under fictitious names for the reason that their true names and capacities, whether individual, corporate, associate or otherwise are unknown to Plaintiff. When said true names and capacities are ascertained, Plaintiff asks leave to amend this complaint so to state.

III

Co-Conspirators

6. Co-conspirator CP Air (hereinafter called "CP"), a Canadian corporation, and Doe Eleven through Doe Twenty, not named as defendants herein, have contracted, combined and conspired with Defendant Qantas for the purpose of allowing Qantas to monopolize and restrain trade, as hereinafter alleged.

IV

Nature of Trade and Commerce

7. Plaintiff Foremost is a wholesale tour operator with offices in Honolulu, Hawaii; San Francisco, California;

Sydney, Australia; and Auckland, New Zealand. Since 1969, its principal business has been the producing, promoting and selling of tour programs to the South Pacific, primarily to Australia and New Zealand.

The words "tour" and "tour program" herein refer only to transportation facilities and hotel arrangements within the country or countries visited by the traveler; air transportation to and from these countries is provided by a cooperating air carrier, under the regulations of the International Air Transport Association.

8. The International Air Transport Association (hereinafter called "IATA"), a Canadian corporation, is a trade association of international air carriers. Its primary function is the regulation of international airfares which are determined at an annual conference of the member carriers. IATA is empowered to enforce the agreed-upon fare structures by imposing fines upon members for any violations that it detects. All scheduled air carriers to the South Pacific are members of IATA. IATA-determined fares which affect air transport to and from the United States are also subject to approval by the CAB. In addition to normal full-rate fares, IATA and the CAB also permit special "tour-basing" fares. These can only be offered in conjunction with the so-called "inclusive tour", or "IT", which must include such prepaid ground arrangements as hotel accommodations, local transportation, sightseeing and other facilities. The minimum cost and content of these ground arrangements are set by IATA regulations. Tour-basing fares are significantly lower than the normal full-rate fares, and make possible the mass marketing of tour program upon which the tour operator's business depends.

9. IATA rules sharply restrict the circumstances under which tour-basing fares may be offered to the public. Inclusive tours are to be produced only by a tour operator, defined in the rules as "a person other than an IATA member who produces and promotes the inclusive tour." Qantas is an IATA member while Foremost is not. The tour operator thus prepares a tour program which can be sold only with the cooperation of an air carrier. The operator must apply to the carrier for specific approval of each tour before he can begin to market it. He must submit the application on a standard IATA form to the "sponsoring" carrier, along with copies of the proposed tour literature. It is only when the carrier approves the inclusive tour, and assigns an "IT" number to it, that the tour can be marketed with the low tour-basing airfare. All tour literature must display the appropriate "IT" number. In return for such sponsorship, the tour operator may agree to restrict the tours to the aircraft of the sponsoring carrier.

10. Most of Foremost's marketing activities are conducted through retail travel agents, to whom brochures and other advertising literature are sent. The agent, who must hold an IATA appointment for this purpose, issues the airline ticket to the traveller and remits the airfare, less his commission, directly to the carrier. Payment for the ground arrangements is made to Foremost, after the agent deducts ten percent (10%) for his commission.

11. During the years that it has been offering tours to the South Pacific, Foremost has acquired an excellent reputation with retail travel agents throughout the United States and Canada and around the world. The tours offered by Foremost under its trade name "Royal Road Tours"

are known in the travel industry for their quality and exceptional value. To build and further improve its reputation and its goodwill in the travel industry, Foremost has expended considerable time, effort and money in developing its relations with travel agents and sellers of ground facilities (hereinafter called "ground operators").

V

Relevant Market

12. The principal market herein involves the sale in the United States and Canada of flexible tours without fixed itineraries (commonly referred to in the travel industry and hereinafter as "freewheeling tours") to Australia and New Zealand (hereinafter referred to as the "South Pacific"), in conjunction with tour-basing airfares. Freewheeling tours provide a completely flexible itinerary combined with prepaid local transportation facilities and accommodation vouchers, usable at a wide selection of local hotels.

13. Freewheeling tours are distinct from preplanned, fixed-itinerary tours, in which the traveler cannot alter the tour offering with regard to routes, schedules or accommodations at the destination. Another feature which distinguishes freewheeling tours is that they are not limited to holiday travellers. Since this type of tour offers a wide choice of accommodations from among a large number of hotels, and since it places local transportation at the disposal of the traveller, the freewheeling tour is attractive to and is purchased by a substantial number of business travellers as well as holidaymakers.

14. A submarket herein involves the sale in the United States and Canada of custom-itinerary tours to the South Pacific, in conjunction with tour-basing airfares. For this type of tour, the traveller chooses his own itinerary and the tour operator confirms all accommodations in advance.

15. Additional submarkets herein involve the sale in Europe, Southeast Asia and Japan of freewheeling tours to the South Pacific, in conjunction with tour-basing airfares. These submarkets are dependent upon ground arrangements in the South Pacific developed in connection with tours from North America.

16. Plaintiff is without exact data as to the volume of air traffic to the South Pacific; but Plaintiff is informed and believes that the total annual volume for all purposes is approximately 100,000 passngers from the United States and Canada, approximately 45,000 passengers from Southeast Asia and Japan, and approximately 45,000 passengers from Europe. Plaintiff is also without exact data as to the number of freewheeling and custom-itinerary tours to the South Pacific sold in these markets, since no accurate information is available from competing tour operators or airlines.

17. As the result of more than five years of intensive efforts, Foremost's Royal Road Tours have attracted a continually increasing share of the total travel market to the South Pacific. In the year ended March 31, 1974, Foremost sold more than 13,000 tours to persons traveling by air from the United States and Canada to Australia or New Zealand, including approximately five million dollars in land components. Plaintiff is informed and believes that

this volume is at least five times greater than that produced by any other tour operator in these markets.

VI

Relationship of the Parties

18. Through the offer of marketing assistance, Qantas in 1969 encouraged Foremost to expend substantial effort and large sums of money to develop and expand the market for tour programs to the South Pacific area from North America. In response thereto, Foremost conceived and developed the idea of a low-cost freewheeling tour to Australia and New Zealand. This fly/drive tour would offer the traveller a prepaid rental car and a book of vouchers, which would be accepted as payment for room rental at many hotels within each country. The traveller would thus be able to select his own itinerary on a day-to-day basis and be assured of high quality accommodations throughout Australia and New Zealand.

19. Foremost then contracted with hotel and rental car operators in Australia and New Zealand to obtain their facilities for its tours. Foremost was able to negotiate low rates for these ground services, based on the prospect of a high volume business through participation in its freewheeling tour program. Only when these new tour programs had been completely assembled and agreements had been signed with the ground operators, did Foremost present them to Qantas and offer to market the program through Qantas.

20. Foremost developed promotional material, marketing methods, and sales training aids, and thereby greatly

increased public acceptance of, and demand for, freewheeling tours to the South Pacific. Later, Foremost's programs were expanded to include various combinations of motorcoach and air travel as the local transportation components; these became known as the Royal Road Fly/Coach and Fly/Tour programs.

21. As the new programs proved successful, Qantas offered assurances of continued support and required Foremost to establish additional offices in the United States and the South Pacific, to de-emphasize and discontinue certain established tour programs to other parts of the world, and to discontinue participation with other air carriers in tour programs to the South Pacific. Encouraged by Qantas' continued assurances of long-term participation, Foremost completely computerized its procedures for planning individual and group travel itineraries, and installed nationwide toll-free telephone service to facilitate booking procedures. In reliance upon its relationship with Qantas, Foremost developed and began to market, with the assistance of Qantas, a similar series of tours from Southeast Asia, Japan and Europe to Australia and New Zealand. These tours used the same ground facilities and accommodations as the tours from North America.

VII

Count One

22. Plaintiff brings this Count One against Defendant Qantas under Sections 4 and 16 of the Clayton Act (15 U.S.C. 15, 26) to recover treble damages for injuries sustained by Plaintiff arising from Qantas' violation of Section

2 of the Sherman Act (15 U.S.C. 2) and to prevent and to restrain Qantas from continuing to violate said section.

23. Plaintiff herein incorporates by reference the allegations contained in paragraphs 3 through 21 above.

24. Beginning as early as 1972 and continuing to the date of the filing of this complaint, Defendant Qantas has been engaged in a combination and conspiracy to monopolize, in attempts to monopolize, and in actual monopolization of the interstate and foreign commerce described in paragraphs 12 through 17 above.

25. Qantas in bad faith induced Foremost to enter into various agreements, to be proven at trial, wherein Qantas pledged continued marketing support for Foremost's free-wheeling tours through 1977. In reliance upon Qantas' repeated assurances of continued support, Foremost thereafter devoted nearly all of its business efforts to programs being marketed in conjunction with Qantas; and, in attempting to expand and improve its tour programs with Qantas, Foremost neglected other business opportunities and other air carriers.

26. In 1973, Qantas in bad faith initiated negotiations for the purchase of Foremost's business. During the course of the discussions, Qantas agreed upon $5 million as the purchase price for a fifty-one percent (51%) interest in Royal Road tour programs to the South Pacific. In reliance upon the good faith of Qantas and its representatives and in response to their requests, Foremost furnished substantial confidential business information.

27. Qantas further requested and Foremost in its own offices trained approximately fifty (50) Qantas employees in the operation of Foremost's wholesale tour business.

28. These activities were commenced and continued by Qantas in bad faith and with the purpose of gaining access to Foremost's confidential business information and of learning the day-to-day operations of Foremost's business. With the knowledge thus acquired, Qantas intended to and has set out to deprive Foremost of its established wholesale tour business to the South Pacific.

29. In November, 1973, Qantas abruptly informed Foremost that Qantas would begin to operate its own free-wheeling tours to the South Pacific, beginning April 1, 1974, and that it would terminate all dealings with Foremost.

30. Qantas thereafter publicly announced that although its business relations with Foremost had been satisfactory, Qantas would no longer do business with Foremost but that Qantas would continue doing business with other tour operators and wholesalers; Qantas further announced that it expected substantially to duplicate Foremost's volume of tour business to the South Pacific.

31. As the major air carrier serving Australia, and an enterprise owned by the Government of Australia, Qantas enjoys a strategic dominance in air transportation to the South Pacific. Qantas has diverted its vast network of airline services and facilities to the use of its wholesale tour operation called "Qantas Holidays". The availability and use of these resources gives Qantas Holidays sufficient power and strategic dominance to exclude competitors from, and control prices within, the markets for tours to the

South Pacific. In fact, Qantas' conduct surrounding its entrance into the wholesale tour business shows a clear intent on its part to monopolize the relevant markets. This conduct, undertaken by Qantas with the predatory intent and purpose to eliminate Foremost as a competitor in this market, consists of the following unlawful acts, among others.

32. Prior to and since April 1, 1974, Qantas began widely promoting and selling in North America, Southeast Asia and Japan a series of freewheeling tours to the South Pacific which are almost exact duplicates of programs conceived and marketed by Foremost since 1969. In the absence of clear notice to the contrary, prospective travellers have no way of knowing that Qantas' tours are in fact different from Foremost's.

(a) Qantas has distributed promotional materials substantially similar to the materials produced by Foremost.

(b) The tours offered by Qantas are copies of tours offered by Foremost.

(c) Qantas has attempted to obscure the significance of its break in relations with Foremost in order to falsely convey the impression of continuity with Foremost's tour programs. And Qantas is misrepresenting itself to the travel industry and to the public as the developer and proprietor of tours actually conceived, developed and continuously marketed under Foremost's registered trade name "Royal Road Tours".

33. Qantas is selling its freewheeling tours to travel agents and prospective travellers by misrepresenting them as Royal Road Tours.

34. Plaintiff is informed and believes that Qantas is selling its freewheeling tours to the South Pacific below their actual cost, and without any provision for normal overhead or profit.

35. Since April 1, 1974, Qantas had refused to deal with Foremost, contrary to the agreements between the parties. This is being done by Qantas with the intent to eliminate Foremost as a viable competitor in these markets, and to establish Qantas Holidays as the leading wholesale tour operator to the South Pacific. Specifically,

(a) Qantas abruptly ceased dealing with Foremost and began to use Qantas Holidays exclusively for the promotion of freewheeling tours in these markets;

(b) Qantas has refused to provide air transportation to Foremost customers, contrary to Qantas' obligation to provide air transportation to the general public;

(c) Qantas refuses to reserve blocks of seats for Foremost on flights to the South Pacific during the 1974 Christmas season, in order to interfere with Foremost's business, which is dependent upon advance reservations during peak holiday seasons. Such advance blocking of seats had been made for Foremost in the past.

36. Through its position as reservations agent for Air New Zealand in Hawaii, Qantas has misappropriated for itself tour business intended for Foremost through Air New Zealand.

37. Qantas is misappropriating business intended for Foremost by inducing actual and prospective customers of

Foremost to switch to Qantas Holidays tours, disparaging Foremost for that purpose.

38. Plaintiff is informed and believes that Qantas is subwholesaling its freewheeling tours through other tour wholesalers, at prices below their actual cost, for the purpose of saturating the market with Qantas Holidays tours, in order to eliminate Foremost as a competitor and to monopolize the market for freewheeling tours to the South Pacific.

39. Qantas' promotional materials contain numerous deliberate misrepresentations of fact, including car rental free mileage allowance, number of participating hotels, availability of direct flights, and prices of optional extensions. Qantas thereby attempts to mislead prospective tour customers into believing that Qantas Holidays tours are superior to those offered by Foremost.

40. Qantas is generally disparaging Foremost, interfering with Foremost's contracts, attempting to hire key employees of Foremost, and inducing parties with whom Foremost has made contracts to breach those contracts, thereby causing damage to Foremost's business relations and goodwill.

41. Qantas is unlawfully tying the sale of its Qantas Holidays tours to the sale of air transportation by requiring that such tours must be restricted to the services of Qantas Airways.

42. Qantas performed all of the actions described in paragraphs 24 through 41 above, and combined and conspired with others known and unknown to perform said

actions, with full knowledge of their impact on the relevant markets and on Foremost, and with the intent of injuring and eliminating Foremost as a competitor in these markets, for the purpose of monopolizing the tour business to the South Pacific.

43. The overall effect of the aforesaid conduct has been to substantially and unreasonably lessen competition and restrain the interstate and foreign trade described in paragraphs 12 through 17 above.

44. As a further direct and intended result of Qantas' predatory conduct, Foremost has been injured and is in immediate and substantial danger of being eliminated as an effective competitor in these markets, and of losing its business entirely. Should Qantas continue to engage in this conduct, Foremost will continue to be injured in an amount as yet undetermined, but believed to be not less than TWENTY MILLION DOLLARS ($20,000,000).

VIII

COUNT TWO

45. Plaintiff brings this Count Two against Defendant Qantas under Sections 4 and 16 of the Clayton Act (15 U.S.C. 15, 26) to recover treble damages for injuries sustained by Plaintiff arising from Qantas' violation of Section 1 of the Sherman Act (15 U.S.C. 1) and to prevent and to restrain Qantas from continuing to violate said section.

46. Plaintiff herein incorporates by reference the allegations contained in paragraphs 3 through 21 above.

47. Beginning in 1973, and continuing to the date of the filing of the complaint, Qantas and its co-conspirator, CP Air (CP) have been engaged in an unlawful combination and conspiracy in unreasonable restraint of the interstate and foreign trade described in paragraphs 12 through 17 above. Said combination and conspiracy consists of a continuing agreement, understanding and concert of action between Qantas and its co-conspirator, the substantial terms, purposes and intent of which are as follows:

(a) Qantas unlawfully induced CP to terminate its prior relationships with Foremost and to exclude Foremost from the tour markets served by CP and Qantas. Qantas and CP further agreed that CP would promote and sell exclusively Qantas Holidays freewheeling tours in these markets.

(b) Qantas and CP have unlawfully agreed to promote and sell Qantas Holidays tours at prices fixed by Qantas. Plaintiff is informed and believes that both Qantas and CP are selling these tours below their actual costs, and without provision for normal overhead or profit.

(c) Qantas and CP have unlawfully agreed not to compete for tour business in markets served by them jointly, and to divide and allocate between themselves the North American market for freewheeling tours to the South Pacific.

(d) Qantas and CP have unlawfully agreed to tie the sale of Qantas Holidays tours to the sale of air transportation by requiring that such tours must be restricted to the services of Qantas and CP Air.

48. During the period of time covered by this complaint, and for the purpose of formulating and effecting the aforesaid combination and conspiracy, Qantas in addition performed each of the acts alleged in paragraphs 24 through 41 above, which are herein incorporated by reference.

49. Qantas performed all of the acts described in paragraphs 47 and 48 with full knowledge of their impact on the relevant markets and on Foremost, and with the intent of injuring and eliminating Foremost as a competitor in these markets.

50. Qantas and CP are the only airlines operating direct flights from Canada to Sydney, Australia. The overall effect of the aforesaid combination and conspiracy has been to substantially and unreasonably lessen competition and restrain the interstate and foreign trade described in paragraphs 12 through 17 above.

51. As a further direct and intended result of the aforesaid combination and conspiracy, Foremost has been injured and is in immediate and substantial danger of being eliminated as an effective competitor in these markets, and of losing its business entirely. Should Qantas continue to engage in this combination and conspiracy, Foremost will continue to be injured in an amount as yet undetermined, but believed to be not less than TWENTY MILLION DOLLARS ($20,000,000.00).

IX

PRAYER

52. WHEREFORE, Plaintiff prays that the court adjudge and decree as follows:

Complaint Filed in the District Court

(a) That Qantas has engaged in a combination and conspiracy to monopolize, in an attempt to monopolize, and in actual monopolization of interstate and foreign commerce in violation of Section 2 of the Sherman Act;

(b) That Qantas has entered into a combination and conspiracy in restrain of interstate and foreign trade and commerce in violation of Section 1 of the Sherman Act;

(c) That Qantas be restrained and permanently enjoined from acting in any manner whatsoever, directly or indirectly, as a wholesale tour operator and from acting in any manner, directly or indirectly, to produce or operate tours to Australia or New Zealand in competition with Plaintiff and other legitimate wholesale tour operators, pursuant to Section 16 of the Clayton Act;

(d) That Plaintiff have judgment against Qantas in the sum of TWENTY MILLION DOLLARS ($20,000,000.00), together with any other money damages that may occur by reason of any continuing injury in the future, and that this amount be trebled, as required by Section 4 of the Clayton Act;

(e) That Plaintiff be awarded reasonable attorneys' fees and recover its costs of litigation, as provided by Section 4 of the Clayton Act; and

(f) That Plaintiff have such other and further relief as the court may deem just and proper.

DATED: May 30, 1974.

/s/ KEVIN HUGHES
KEVIN HUGHES
Attorney for Plaintiff

Complaint Filed in the District Court

RONALD C. FENWICK, being duly sworn, deposes and says:

That he is president of Foremost International Tours, Plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same are true of his own knowledge, except as to those matters that are therein stated on Plaintiff's information and belief, and, as to those matters, that he believes them to be true.

/s/ RONALD C. FENWICK, President
RONALD C. FENWICK

INDIVIDUAL

STATE OF HAWAII,
CITY AND COUNTY OF HONOLULU, *ss.:*

On this 30th day of May, ..., A.D. 1974, before me personally appeared RONALD C. FENWICK to me known to be the person described in and who executed the foregoing instrument and acknowledged that he executed the same as his free act and deed.

/s/ ELEANI H. FLOYD
Notary Public, First Judicial Circuit,
State of Hawaii.
My Commission Expires October 29, 1977

[SEAL]

Third Party Complaint Filed With The Civil Aeronautics Board

ALEXANDER ANOLIK
KEVIN HUGHES
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1255 Post Street, Suite 711
San Francisco, California 94109
Telephone: (415) 776-3800

Attorneys for Complainant

BEFORE THE

CIVIL AERONAUTICS BOARD

WASHINGTON, D.C.

Docket ———

FOREMOST INTERNATIONAL TOURS, INC.,

Complainant,

VS.

QANTAS AIRWAYS LIMITED,

Respondent.

THIRD-PARTY COMPLAINT OF
FOREMOST INTERNATIONAL TOURS, INC.

Communications with respect to this document should be sent to:

Third Party Complaint Filed With
The Civil Aeronautics Board

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Dated: March 14, 1975.

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BEFORE THE

CIVIL AERONAUTICS BOARD

WASHINGTON, D.C.

Docket ———

FOREMOST INTERNATIONAL TOURS, INC.,

Complainant,

VS.

QANTAS AIRWAYS LIMITED,

Respondent.

Third Party Complaint Filed With
The Civil Aeronautics Board

Foremost International Tours, Inc., complainant (hereinafter "Foremost"), brings this complaint against Qantas Airways Limited, respondent (hereinafter "Qantas"), and alleges as follows:

FIRST CAUSE OF ACTION

I

This complaint is filed pursuant to Sections 402, 403, 404, 411 and 1002 of the Federal Aviation Act of 1958, as amended (hereinafter referred to as "Act"), and Rules 201 and 204(a) of the Board's Rules of Practice.

II

Complainant Foremost International Tours, Inc., is, and at all times herein mentioned was, a corporation organized and existing under the laws of the State of Hawaii, with its principal offices located in Honolulu, Hawaii. At all times mentioned in this complaint, Foremost has been engaged in the business of a wholesale tour operator, principally engaged in the production and sale of inclusive tours to Australia and New Zealand.

III

Respondent Qantas Airways Limited, is, and at all times herein mentioned was, a foreign air carrier within the meaning of Section 101(19) of the Act, and a holder of a foreign air carrier permit authorizing it to engage in foreign air transportation, issued to it by the Board pursuant to Section 402 of the Act.

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The Civil Aeronautics Board

IV

In 1969, Foremost entered into a relationship with Qantas, whereby Qantas became the sponsoring carrier of a series of inclusive tour programs created and operated by Foremost. These tour programs, offered to the public as Foremost Royal Road Tours, were and are freewheeling packages offering the traveler a combination of hotel accommodation and ground transportation, thereby allowing the traveler to develop his own itinerary. In furtherance of the development of these tour programs, Foremost entered into contractual relations with suppliers of the various component parts of the tours.

V

Relying on assurances of continued support from Qantas, Foremost developed promotional material, marketing methods, sales techniques and sales training aids, thereby greatly increasing public acceptance of, and demand for, its Royal Road freewheeling tours to the South Pacific. Foremost is informed and believes that its Royal Road tour series achieved a greater volume in the sale of inclusive tours to the South Pacific than did tours offered by any other tour operator in the history of travel to the region. In order to establish itself as the exclusive sponsoring carrier of Foremost Tours, Qantas required that Foremost enter into an agreement designating Qantas as the exclusive sponsoring carrier of Foremost Royal Road Tours, and Qantas induced Foremost to accept payments in connection with the said agreement, in the sum of $750,000 per annum, payable monthly.

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The Civil Aeronautics Board

VI

On November 9, 1973, Qantas abruptly informed Foremost that Qantas would soon thereafter begin to produce and operate its own series of freewheeling inclusive tours to the South Pacific, through its own Qantas tour department, and that, beginning April 1, 1974, it would terminate all dealings with Foremost, in breach of its various agreements with Foremost.

VII

Thereafter, on April 1, 1974, Qantas commenced to sell an inclusive tour series through its Qantas Holidays tour department, an unincorporated department of Qantas Airways Limited. The said tour series is produced, packaged, marketed and operated by Qantas Airways Limited.

VIII

By operating the aforementioned tour business through its own tour department, Qantas has been, and is, engaged in unauthorized air commerce and foreign air commerce within the meaning of Sections 101(4) and 101(20) of the Act, and is thereby in violation of Section 402 of the Act, which prescribes the terms and limitations of its foreign air carrier permit to engage in foreign air transportation, and is acting contrary to the public interest.

IX

Qantas has held out to the public and has performed such unauthorized activities in air commerce and foreign air commerce, as services in connection with air transportation, under a name other than the name in which its

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operating authorization is issued, to-wit: "Qantas Holidays," the use of which name, on information and belief, has not been authorized by the Board, in violation of Part 215.2 of the Board's Economic Regulations, and contrary to the public interest.

SECOND CAUSE OF ACTION

I

Foremost repleads, realleges and incorporates herein by reference each and every allegation contained in Paragraphs I through IX of its First Cause of Action.

II

Complainant is informed and believes that at no time prior to April 1, 1974, or subsequent to that date, has Qantas filed with the Board a tariff specifically describing its tour operations and other unauthorized activities in air commerce and foreign air commerce as services offered in connection with air transportation. Instead, Qantas filed a tariff publication which failed to describe the aforementioned services offered in connection with air transportation. On information and belief, the Board failed to make the determination required by Part 221.180 of the Board's Economic Regulations, that the aforementioned deficient tariff publication is consistent with Section 403 of the Act and with the regulations in Part 221 of the Board's Economic Regulations.

III

The filing by Qantas of the aforementioned deficient tariff has resulted and will continue to result in public

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uncertainty with regard to the services offered by Qantas and Board authorization of those services, and has provided the Board with insufficient data to make a determination that the aforementioned services are consistent with the requirements of the Act and with the public interest.

IV

By reason of the foregoing, the tariff publication filed by Qantas is in violation of Section 403(a) of the Act and Parts 221.3(a), 221.38(a) and 221.53 of the Board's Economic Regulations, and is not in the public interest.

THIRD CAUSE OF ACTION

I

Foremost repleads, realleges and incorporates herein by reference each and every allegation contained in Paragraphs I through IX of its First Cause of Action, and in Paragraphs II through IV of its Second Cause of Action.

II

With respect to the aforementioned unauthorized activities in air commerce and foreign air commerce offered by Qantas as services in connection with air transportation, Qantas has failed to establish, observe and enforce just and reasonable charges and just and reasonable classifications, rules, regulations and practices relating to foreign air transportation, all in violation of Section 404(a)(2) of the Act and contrary to the public interest.

Third Party Complaint Filed With
The Civil Aeronautics Board

FOURTH CAUSE OF ACTION

I

Foremost repleads, realleges and incorporates herein by reference each and every allegation contained in Paragraphs I through IX of its First Cause of Action, Paragraphs II through IV of its Second Cause of Action, and Paragraph II of its Third Cause of Action.

II

Commencing April 1, 1974, and continuing up to the date of the filing of this complaint, Qantas has offered for sale and has sold Qantas tours at prices less than their actual cost to Qantas.

III

Qantas has incurred various costs, direct and indirect in an amount as yet undetermined, in connection with its unauthorized activities in air commerce and foreign air commerce, and with the sale of each inclusive tour offered therewith. No part of the costs of said unauthorized business operations in air commerce and foreign air commerce, whether direct or indirect, may be attributed to Qantas' authorized operations in air transportation. Revenues from the sale of the aforementioned tours are insufficient to allow Qantas to recover the costs of operating its unauthorized tour business. Revenues from the sale of air transportation are thereby diverted to cover the cost, direct and indirect, of each said tour, in an amount as yet undetermined.

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IV

On May 30, 1974, Foremost filed in the United States District Court for the District of Hawaii, a complaint alleging various antitrust violations against Qantas, and praying for damages and for injunctive relief. An evidentiary hearing was had with respect to Foremost's motion for a preliminary injunction, and in consequence of that hearing, the District Court found that Foremost "made an unrebutted prima facie showing that Qantas is marketing its tours below cost." By way of example, the District Court found that a Qantas 14-day group inclusive tour to Australia, at $899 was sold for 57 cents less than the cost to Qantas of the component parts of the tour, at the actual and then prevailing rate of exchange. The said cost deficit, and similar deficits on the other tours in the Qantas series, were incurred by Qantas with no provision made for recovery of any other cost, direct or indirect, incurred by Qantas in connection with its tour business operations. The Decision of the District Court is attached hereto as Exhibit "A".

V

In consequence of the aforesaid findings, the District Court, on July 26, 1974, issued a preliminary injunction requiring that Qantas withdraw its tours from sale until such time as the court should approve revised prices for the said tours. Tentative approval was later given to a schedule of such revised prices, pending the results of a court-ordered independent audit scheduled for June, 1975.

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VI

Foremost is informed and believes that any Qantas tour now marketed at the aforesaid court-directed revised prices which is not being sold at a price below cost would be sold below cost but for the order of the District Court restraining Qantas from thus selling below cost, and that Qantas will resume and continue its practice of selling said tours at prices below cost at such time as it may be relieved from the order of the District Court.

VII

Since inclusive tours are offered for sale at a package price which includes air transportation, the air fare portion of each such tour is discounted by Qantas in an amount necessary to recover the cost deficit on each tour sold, in violation of Section 403(b) of the Act and Part 221.3(b) of the Board's Economic Regulations, and contrary to the public interest.

FIFTH CAUSE OF ACTION

I

Foremost repleads, realleges and incorporates herein by reference each and every allegation contained in Paragraphs I through IX of its First Cause of Action, Paragraphs II through IV of its Second Cause of Action, Paragraph II of its Third Cause of Action, and Paragraphs II through VII of its Fourth Cause of Action.

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The Civil Aeronautics Board

II

By making the aforementioned discounts available only to passengers traveling on Qantas tours, Qantas has given and caused to be given an undue and unreasonable preference and advantage to the aforesaid passengers in foreign air transportation traveling on Qantas tours, and has subjected passengers in foreign air transportation not traveling on Qantas tours to unjust discrimination and undue and unreasonable prejudice and disadvantage, all in violation of Section 404(b) of Act and Parts 223.2 and 223.8 of the Board's Economic Regulations, and contrary to the public interest.

SIXTH CAUSE OF ACTION

I

Foremost repleads, realleges and incorporates herein by reference each and every allegation contained in Paragraphs I through IX of its First Cause of Action, Paragraphs II through IV of its Second Cause of Action, Paragraph II of its Third Cause of Action, Paragraphs II through VII of its Fourth Cause of Action, and Paragraph II of its Fifth Cause of Action.

II

Beginning as early as 1972 and continuing to the date of the filing of this complaint, Qantas has been engaged in unfair and deceptive practices and unfair methods of competition in air transportation and the sale thereof, including those hereinabove described.

Third Party Complaint Filed With
The Civil Aeronautics Board

III

At various times during the course of its business relationship with Foremost, Qantas in bad faith induced Foremost to enter into various agreements, written and oral, wherein Qantas pledged continued sponsorship and support for Foremost's freewheeling inclusive tours at least through 1977. In reliance upon Qantas' repeated assurances of continued support, Foremost thereafter devoted nearly all of its business efforts tour programs marketed in conjunction with Qantas; and in attempting to expand and improve its tour programs with Qantas, Foremost neglected other business opportunities and opportunities with other air carriers.

IV

In 1973, Qantas in bad faith initiated negotiations for the purchase of Foremost's business. During the course of the discussions, Qantas agreed upon $5,000,000 as the purchase price for a 51 per cent interest in Foremost's Royal Road tour programs to the South Pacific. In reliance upon the good faith of Qantas and its representatives and in response to their requests, Foremost furnished substantial business information to Qantas.

V

In response to requests from Qantas, Foremost trained in its own offices approximately 50 Qantas employees in the operation of Foremost's wholesale tour business.

VI

These activities were commenced and continued by Qantas in bad faith and with the purpose of gaining access

to Foremost's confidential business information and of learning the day-to-day operations of Foremost's business. With the knowledge thus acquired, Qantas intended to and has set out to deprive Foremost of its established wholesale tour business to the South Pacific, and to acquire for itself a dominant share of that business.

VII

As hereinabove alleged, on November 9, 1973, Qantas abruptly informed Foremost that Qantas would soon thereafter begin to produce and operate its own series of freewheeling inclusive tours to the South Pacific, through its own Qantas tour department, and that, beginning April 1, 1974, it would terminate all dealings with Foremost, in breach of its various agreements with Foremost.

VIII

Qantas thereafter publicly announced that although its business relations with Foremost had been satisfactory, Qantas would no longer do business with Foremost but that Qantas would continue doing business with other tour operators and wholesalers; Qantas further announced that it expected substantially to duplicate Foremost's volume of tour business to the South Pacific.

IX

As hereinabove alleged, on April 1, 1974, Qantas commenced to sell through its Qantas Holidays tour department an inclusive tour series produced, packaged, marketed and operated by Qantas.

X

Prior to and since April 1, 1974, Qantas has widely promoted and sold a series of freewheeling inclusive tours to the South Pacific which are virtual duplicates of tours conceived and marketed by Foremost since 1969. In the absence of clear notice to the contrary, prospective travelers have no way of knowing that Qantas' tours are in fact different from Foremost's, since:

(a) Qantas has distributed promotional materials which are substantially identical to the materials previously produced by Foremost;

(b) The tours offered by Qantas are copies of tours offered by Foremost;

(c) Qantas has attempted to obscure the significance of its break in relations with Foremost in order falsely to convey the impression of continuity with Foremost's tour programs; Qantas has further misrepresented itself to the travel industry and to the public as the developer and proprietor of tours actually conceived, developed and continuously marketed under Foremost's registered trade name "Royal Road Tours".

XI

Qantas has sold its freewheeling tours to travel agents and prospective travelers by misrepresenting them as Royal Road Tours.

XII

Qantas has sold and is selling its freewheeling inclusive tours to the South Pacific at prices below their cost, there-

by discounting each inclusive tour ticket for foreign air transportation in an amount necessary to recover the resulting cost deficit on the land portion of the tour package.

XIII

Since April 1, 1974, Qantas has refused to deal with Foremost, and to carry out the terms of its agreements with Foremost by removing itself from the sponsorship of Foremost tours and using Qantas Holidays exclusively for the development and promotion of freewheeling inclusive tours to the South Pacific; by refusing to provide air transportation to Foremost's customers, contrary to its obligation to provide air transportation to the general public; by refusing to reserve blocks of seats for Foremost on flights to the South Pacific during the 1973 Christmas season, a peak business period, in order to interfere with Foremost's business, which is dependent upon advance reservations during peak holiday seasons, and contrary to its previous practice of routinely providing advance blocking of seats for Foremost in the past.

XIV

Through its position as reservations agent for Air New Zealand in Hawaii, Qantas has misappropriated for itself tour business intended for Foremost through Air New Zealand.

XV

Qantas has misappropriated tour business intended for Foremost by inducing actual and prospective customers of Foremost to switch to Qantas tours, disparaging Foremost for that purpose; Foremost is informed and believes that

but for the order of the District Court enjoining Qantas from engaging in the aforesaid switching of business from Foremost to itself, Qantas would resume and continue the practice.

XVI

Qantas has offered to and has engaged in the practice of sub-wholesaling its freewheeling inclusive tours through other air carriers and tour wholesalers, at prices below their actual cost to Qantas, for the purpose of saturating the market with Qantas tours, and to deprive Foremost of additional outlets for its business.

XVII

To induce public acceptance of Qantas tour programs by means of false, misleading, and deceptive practices, and to divert business from Foremost, Qantas widely advertised and promoted a 10-day group inclusive tour to Australia at a price of $805, the lowest price quoted for any such tour on the market. The District Court found that Qantas' attempts to substantiate its costs on the $805 tour were false, that the hotel rate upon which the tour price as based, "was never intended to be used or sold by either Qantas or the hotel," and that "Qantas never sold any such tour." The District Court further found that the said tour was actually designed as a "bait and switch" sales technique.

XVIII

Promotional materials and advertising distributed by Qantas for the purpose of marketing its tours have contained numerous deliberate misrepresentaions of fact, re-

lating to free mileage allowance on rental cars, number of hotels participating in Qantas tour programs, availability of direct flights on Qantas, and prices of optional tour extensions; Qantas thereby has attempted to mislead prospective tour customers into falsely believing that Qantas tours are superior to those offered by Foremost.

XIX

Qantas is generally disparaging Foremost, interfering with Foremost's contracts, attempting to hire key employees of Foremost, and inducing parties with whom Foremost has made contracts to breach those contracts, thereby causing damage to Foremost's business relations and good will.

XX

As the major air carrier serving Australia, and as an enterprise owned by the government of Australia, Qantas enjoys a strategic dominance in foreign air transportation to the South Pacific; Qantas has diverted its vast network of airline services and facilities to the use of its wholesale tour business; by placing those resources at the disposal of its tour business, Qantas can achieve sufficient power to exclude competitors from, and to control prices within, the market for tours to the South Pacific, and thereby to compete unfairly with Foremost by virtue of its official authorization to engage in foreign air transportation as a foreign air carrier.

XXI

Qantas has engaged in all of the unfair and deceptive practices and unfair methods of competition hereinabove

described in Paragraphs I through XX of this cause of action with full knowledge of their destructive impact on Foremost, and with the intent of injuring and eliminating Foremost as a competitor in the wholesale tour business, for the purpose of monopolizing the tour business to the South Pacific and controlling prices therein, all in contravention of the public interest in free competition and in violation of Section 411 of the Act.

WHEREFORE, Foremost respectfully requests that the Board take the following action:

1. Issue an order directing Qantas to cease and desist from engaging in the business of tour operator, from engaging in the above-mentioned unauthorized activities in air commerce and foreign air commerce, and from engaging in the above-mentioned unfair and deceptive practices and unfair methods of competition;

2. Take such action as is considered necessary to prevent Qantas from further violating the Act pending the issuance of the foregoing cease and desist order; and

3. Grant such other and further relief as to the Board may seem appropriate.

Dated: March 14, 1975.

Third Party Complaint Filed With
The Civil Aeronautics Board

Respectfully submitted,

FOREMOST INTERNATIONAL TOURS, INC.,
Complainant

/s/ RONALD C. FENWICK
Ronald C. Fenwick, *President*

/s/ PATRICK J. CORBETT
Patrick J. Corbett
Secretary-Treasurer
with power of attorney for Foremost International Tours, Inc.
1600 Kapiolani Boulevard
Honolulu, Hawaii 96814

ALEXANDER ANOLIK
KEVIN HUGHES
SUZANNE MCDONNELL

By KEVIN HUGHES
Kevin Hughes
Attorneys for Complainant
Foremost International
Tours, Inc.

Third Party Complaint Filed With
The Civil Aeronautics Board

VERIFICATION

STATE OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO, *ss.:*

RONALD C. FENWICK, being duly sworn, deposes and says that he has read the foregoing Third-Party Complaint of Foremost International Tours, Inc., and the exhibit attached thereto, that he knows the contents thereof, that the matters and things stated therein are true of his own knowledge, except that, with respect to those matters stated therein on information and belief, he believes them to be true.

By /s/ RONALD C. FENWICK
Ronald C. Fenwick, President

By Patrick J. Corbett,
Secretary-Treasurer,
With power of attorney
Foremost International Tours, Inc.
1600 Kapiolani Boulevard
Honolulu, Hawaii 96814

Subscribed and sworn to before
me, this 17th day of March, 1975.

/s/ CECELIA ANOLIK
Notary Public
For the State of California,
City and County of San Francisco
My Commission Expires: May 31, 1976

[SEAL]

Petition for Enforcement, *Foremost International Tours, Inc.* v. *Qantas Airways Limited*, Enforcement Proceeding, Docket 27631 Before the Civil Aeronautics Board

BEFORE THE

CIVIL AERONAUTICS BOARD

WASHINGTON, D. C.

Docket 27631

Complaint of

FOREMOST INTERNATIONAL TOURS, INC.

against

QANTAS AIRWAYS LIMITED

Enforcement Proceeding

PETITION FOR ENFORCEMENT*

It is the opinion of the undersigned Director of the Bureau of Enforcement that there are reasonable grounds to believe that provisions of the Federal Aviation Act of 1958 (the Act) and rules, regulations, orders, limitations, and other conditions established pursuant thereto, as iden-

* The docketing of this petition for enforcement does not constitute Board action. This petition has been docketed with the Board by the Director of the Bureau of Enforcement, in accordance with the provisions of 14 C.F.R. 302.206, in order to institute an economic enforcement proceeding before the Board for the purpose of obtaining a Board determination of whether any violations have been committed, and whether the relief requested should be granted.

tified below, have been and are being violated by virtue of the things done or omitted to be done by Qantas Airways Limited, as described below; that there have been no efforts to satisfy the Third-party Complaint in this docket; and that investigation of the alleged violations as described in those parts of the Third-party Complaint incorporated herein by reference, is in the public interest. Therefore, in accordance with Rule 206 of the Board's Rules of Practice (14 C.F.R. Part 302), the undersigned Director of the Bureau of Enforcement is instituting this economic enforcement proceeding by causing the docketing of this Petition for Enforcement.

This Petition for Enforcement hereby incorporates by reference the following parts of the Third-party Complaint previously filed in this docket by Foremost International Tours, Inc., against Qantas Airways Limited:

(1) The Fourth, Fifth, and Sixth Causes of Action, at pages 5-14 of the Complaint, except paragraph XX of the Sixth Cause of Action; and

(2) The allegations contained in the First Cause of Action, paragraphs I through VII, at pages 1-3 of the Complaint, but no other allegations contained in the First, Second, or Third Causes of Action.[1]

[1] In accordance with Rule 205 (14 C.F.R. 302.205) a letter is being sent to Foremost, with a copy to Qantas, advising that no enforcement proceeding will be instituted with respect to the First, Second, and Third Causes of Action in the Third-Party Complaint, as well as paragraph XX of the Sixth Cause of Action. The reasons for this action, its effects, and procedures for Board review thereof, are contained in that letter.

Petition for Enforcement, Foremost International Tours, Inc. v. Qantas Airways Limited, Enforcement Proceeding, Docket 27631 Before the Civil Aeronautics Board

This Petition for Enforcement does not incorporate by reference the requests for relief contained in Foremost's Third-party Complaint, but rather requests that if Qantas be found, because of its activities as alleged herein by reference, to have failed to comply with Sections 403(b) and 404(b) of the Act (49 U.S.C. 1373(b) and 1374(b)), that Qantas be ordered to comply therewith; and that if Qantas be found, because of its activities as alleged herein by reference, to have engaged in unfair and deceptive practices and unfair methods of competition, within the meaning of Section 411 of the Act (49 U.S.C. 1381), that Qantas be ordered to cease and desist from such practices and methods of competition.

The docketing of this Petition for Enforcement is not to be construed as limiting the authority of the Board to institute or conduct any investigation or inquiry within its jurisdiction in any other manner or according to any other procedure which it may deem necessary or proper.[2]

This Petition for Enforcement is being formally served on Qantas Airways Limited and Foremost International Tours, Inc.

/s/ THOMAS F. MCBRIDE
Thomas F. McBride
Director
Bureau of Enforcement

December 15, 1975
Washington, D. C.

[2] See Rule 206 of the Board's Rules of Practice (14 C.F.R. Part 302).

Petition for Enforcement, Foremost International Tours, Inc. v. Qantas Airways Limited, Enforcement Proceeding, Docket 27631 Before the Civil Aeronautics Board

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of December, 1975, I served the attached Petition for Enforcement upon the parties in this proceeding by mailing to each of them a copy of said Petition in a properly addressed, franked envelope, certified mail.

/s/ SHARON ANN MANEVAL
Sharon Ann Maneval

December 15, 1975
Washington, D. C.

The Letter of Notice of Dismissal, In Part, of the Civil Aeronautics Board December 15, 1975

CIVIL AERONAUTICS BOARD
WASHINGTON, D.C. 20428

December 15, 1975

AIRMAIL

Alexander Anolik, Esq.
Suzanne McDonnell, Esq.
693 Sutter Street-Sixth Floor
San Francisco, California 94102

B-52/75-0362

Re: Third-party Complaint of Foremost International Tours, Inc., against Qantas Airways Limited, Docket 27631
NOTICE OF DISMISSAL, IN PART

Dear Mr. Anolik:

This is to advise you, in accordance with Rule 205(a) of the Board's Rules of Practice (14 C.F.R. Part 302),[1] that the following actions are being taken with respect to the above-referenced Third-party Complaint:

(1) The Director of the Bureau of Enforcement (the Bureau) is docketing a Petition for Enforcement (thereby instituting an economic enforcement proceeding before the Board), which incorporates by reference (1) those allegations contained in the Fourth, Fifth, and Sixth Causes of Action in the Foremost Third-party Complaint (alleging violations of Sections 403(b) and 404(b) of the Act and

[1] See also, Section 1002(a) of the Federal Aviation Act of 1958 (the Act) (49 U.S.C. 1482).

unfair and deceptive practices and unfair methods of competition within the meaning of Section 411 of the Act), except for paragraph XX of the Sixth Cause of Action, and (2) the allegations in paragraphs I through VII of the First Cause of Action.[2] Foremost is being served with a copy of this Petition for Enforcement, and it will be a party to this enforcement proceeding.[3]

(2) Notice is being given to Foremost, by this letter, that no enforcement proceeding will be instituted with respect to the First, Second, and Third Causes of Action, and paragraph XX of the Sixth Cause of Action (alleging violations of Sections 402(a), 403(a), and 404(a) of the Act, and Parts 215 and 221 of the Board's Regulations), except as indicated above. The reasons for this decision are set forth herein.

SUMMARY OF FILINGS

The Foremost Third-party Complaint alleges, in general, that by operating an "in-house" tour operator department,[4] Qantas is engaging in unauthorized foreign air transporta-

[2] The relief requested in the Petition for Enforcement is not the same as that in the Foremost Third-party Complaint.

[3] See Rule 210 of the Board's Rules of Practice (14 C.F.R. Part 302).

[4] A "tour operator" can be defined as a business which prepares, operates, and markets on a "wholesale" basis to travel agents, inclusive (package) tours for air transportation plus ground arrangements. An "in-house" tour operation can be defined as a tour operator business conducted by a department or office of an air carrier or foreign air carrier, and not through a separate corporate or business structure. (These definitions are not the same as, and should not be confused with, the term "tour operator" as used in several Parts of the Board's Regulations. Also, "inclusive tours", as used in this letter, should not be confused with "inclusive tour charters" as used in Part 378 of the Board's Regulations).

tion in violation of Section 402(a) of the Act; that Qantas is violating the name usage restrictions of Part 215 of the Board's Regulations; that Qantas has failed to file proper tariffs concerning its tour operations, in violation of Section 403(a) of the Act and Part 221 of the Regulations; and that Qantas has failed to comply with Section 404(a) of the Act, concerning just and reasonable charges and classifications and practices.

The Foremost Third-party Complaint also alleges that Qantas is violating Section 403(b) of the Act and Section 221.3(b) of the Regulations (by selling inclusive tours at package prices which fail to fully cover the costs of the tours), and Section 404(b) of the Act and Sections 223.2 and 223.8 of the Regulations (by giving an unfair preference to passengers on its tours and subjecting passengers not on its tours to unjust discrimination and unreasonable disadvantage), and that Qantas is engaging in unfair practices and methods of competition within the meaning of Section 411 of the Act (because of the specific practices cited by Foremost). Those charges are incorporated in the Petition for Enforcement referred to above, and need not be discussed here.

Foremost asks the Board to direct Qantas to cease and desist from engaging in (1) the business of a tour operator, (2) the described unauthorized activities, and (3) the described unfair and deceptive practices and unfair methods of competition. Foremost also asks the Board to take necessary interim action and to grant other appropriate relief.

Qantas filed a Preliminary Statement and Answer to Foremost's Third-party Complaint. In its preliminary statement, Qantas requests the Board to (1) accept jurisdiction of the matters in dispute between Foremost and

Qantas, (2) approve the entry of Qantas into the inclusive tour market and its sale of such tours at prices which conform with IATA resolutions and Qantas' tariffs, and (3) promulgate appropriate regulations to uniformly regulate air carriers and foreign air carriers engaged in inclusive tours.

In its Answer to the Complaint, Qantas denies the allegations of its violations of the Act and Regulations. Qantas requests the Board to (1) exercise its jurisdiction over the matters alleged in the Third-party Complaint, (2) order that Qantas and other foreign air carriers are authorized to sell inclusive tours through their own tour departments or subsidiaries, (3) order that it is in the public interest for foreign air carriers to sell inclusive tours at prices which conform to IATA resolutions and include costs charged to the carriers by suppliers of land components of the tours, (4) define those costs which the Board determines should be included in the sales price of inclusive tours, (5) initiate an investigation of the inclusive tour business conducted by air carriers and foreign air carriers, and establish regulations with respect to this subject, and (6) deny the relief requested by Foremost.

BACKGROUND

There is currently pending in the United States District Court for the District of Hawaii an antitrust action by Foremost against Qantas.[5] The District Court judge presiding over that case issued a decision on certain preliminary matters,[6] in which he concluded that,

---

[5] Civil No. 74-116.

[6] 379 F.Supp. 88 (D. Haw. 1974), aff'd, No. 74-2463, U.S. Court of Appeals for the Ninth Circuit, October 22, 1975.

(1) the challenged actions of Qantas are not immunized from antitrust attack by virtue of Section 414 of the Act;

(2) the entry of Qantas into the inclusive tour business and its below cost pricing practice, switching of tours, as well as the other charges of anticompetitive activity —terminating a business relationship, obtaining confidential information, imitating Foremost's brochures, boycotting, tyings, and dividing the market—are within the initial jurisdiction of the CAB; and

(3) enjoined Qantas from selling its tours at prices which do not include all of the direct and indirect costs of the tours, and from shifting to itself business intended for Foremost.

Foremost then filed this Third-party Complaint with the Board, in order to bring to the attention of the Board the matters which the District Court judge referred here. The court retained jurisdiction over the alleged antitrust violations, but stayed further proceedings pending review, consideration, determination, and findings by the Board on the matters referred. This was said by the judge, though, not to indicate any intent to restrict the scope of the Board's investigation and rulings on any of the issues presented by Foremost's complaints.

Airline "In-House" Tour Operator Activities

The basic issue raised by the Foremost Third-party Complaint, as well as the related antitrust action in Hawaii, is whether air carriers and foreign air carriers should be prohibited from engaging in tour operator activities "in-house",

whether they should be limited in some degree from such activities, or whether they should be permitted to compete unrestricted with "independent" tour operators. The Board may be able to assist the District Court hearing the antitrust action, and the tour operator business and other interested persons, by resolving this question, but the Bureau does not believe that an enforcement proceeding is the appropriate vehicle for this task.

While it is possible that the conduct of "in-house" tour operator businesses by air carriers and foreign air carriers could constitute a section 411 practice or method of competition, the Bureau does not have sufficient evidence at this time to believe that "in-house" tour operations are violative of that or any other section of the Act or Board Regulations. Therefore, no enforcement proceeding will be instituted with regard to those parts of Foremost's Third-party Complaint which deals with this issue.

However, a rulemaking proceeding at the Board would be a very good place for Foremost or other interested persons to attempt to resolve the "in-house" issue. Any interested person, including Foremost or Qantas, may petition the Board for the issuance of a regulation to specifically permit, prohibit, or permit subject to limitations, air carriers and/or foreign air carriers from conducting tour operator activities "in-house" or through any other form of business structure. Such petitions for rulemaking are specifically authorized and governed by the provisions of Rule 38 of the Board's Rules of Practice (14 C.F.R. 302.38). The action taken in this letter does not in any way limit the right of anyone to petition for rulemaking on the subject of airline "in-house" tour operations, and may be considered an invitation and encouragement to do so.

The Letter of Notice of Dismissal, In Part, of the Civil Aeronautics Board December 15, 1975

It should also be pointed out that persons interested in this subject, and in particular those who will be filing petitions for rulemaking by the Board on this subject, may also petition the Board to reexamine the previous approval of IATA Resolution 810d—"Inclusive Tours Initiated by Members", which has sometimes been cited as an expression of the Board's views on "in-house" tour operations. This resolution was first approved by the Board in 1952, but it does not appear that the advantages and disadvantages of airline "in-house" tour departments were considered in detail at that time or since.[7] Foremost or any other person may consider it useful to seek to have the Board conduct such an examination of IATA Resolution 810d in conjunction with a proposed rulemaking proceeding on the "in-house" issue, and to request the Board to reaffirm its approval, to disapprove, or to have additional conditions attached to the approval of that resolution. Again, the action taken in this letter is not a limitation, and may be read as an invitation and encouragement, for any person to file a petition or motion requesting the Board to reexamine the approval of IATA Resolution 810d in conjunction with any proposed rulemaking proceeding on the "in-house" tour operator issue.

OTHER ALLEGED VIOLATIONS

Foremost also alleges that Qantas is violating Section 215.2 of the Board's Regulations by holding out to the

[7] See Order E-6695, issued August 14, 1952, approving, among other agreements, IATA Resolution 810d under the designation Agreement CAB 6262-R-101. Also see Order E-24886, issued March 23, 1967, which denied a petition for Board review of staff action in approving certain amendments to IATA Resolution 810d.

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public and performing air transportation services using a name other than that in which its operating authorization is issued or which name has been authorized by the Board. Foremost also alleges that Qantas is violating Section 403(a) of the Act and Sections 221.3(a), 221.38(a), and 221.53 of the Board's Regulations by failing to file with the Board a tariff specifically describing its tour operations as services offered in connection with air transportation. Finally, Foremost alleges that Qantas is violating Section 404(a) of the Act by failing to establish, observe, and enforce just and reasonable charges and just and reasonable classifications, rules, regulations, and practices relating to foreign air transportation.

All of these charges are premised on our acceptance of the characterization of Qantas' tour operator activities as air transportation services. Foremost has not supplied sufficient evidence to demonstrate to the Bureau of Enforcement that there are reasonable grounds to believe that this is so, and thus that these provisions of the Act and Regulations have been violated. Therefore, no enforcement proceeding will be instituted with respect to these allegations.

EFFECT OF THIS LETTER, AND REVIEW PROCEDURES

In accordance with Section 1002(a) of the Act and Rule 205(b) of the Board's Rules of Practice (14 C.F.R. Part 302), this letter advising you that no enforcement proceeding will be instituted with respect to the above-described parts of Foremost's Third-party Complaint in Docket 27631 will be deemed to be an order of the Board dismissing those parts of that Third-party Complaint, unless review

The Letter of Notice of Dismissal, In Part, of the Civil Aeronautics Board December 15, 1975

of this ruling is requested by Foremost or is initiated by the Board.

Rule 205(c) of the Board's Rules of Practice (14 C.F.R. Part 302) provides that within 20 days after service of this letter refusing to institute an enforcement proceeding with respect to any part of Foremost's Third-party Complaint, Foremost may file a motion with the Board to review such action. The proceedings on such a motion, if it is filed, will be in accordance with 14 C.F.R. 302.18. Upon conclusion of such proceedings, if initiated, the Board will enter an order either dismissing these parts of Foremost's Third-party Complaint or directing such other action as it deems appropriate. If Foremost does not appeal, the Board may review the action described in this letter on its own initiative, within 15 days after the expiration date for appeal by Foremost.

Copies of this letter have been sent to Qantas and to the Board, and are available to the public.

Sincerely yours,

/s/ THOMAS F. McBRIDE
Thomas F. McBride
Director
Bureau of Enforcement

Affidavit of Service

I, Michael J. Holland, being over the age of 18 years, an associate attorney employed by the firm of Condon & Forsyth, hereby certify that I have on this 12th day of March, 1976, served three copies of the foregoing Appendix to the Petition for a Writ of Certiorari upon Respondent Foremost International Tours, Inc. by mailing copies thereof to its attorneys of record in sealed envelopes, with air mail postage prepaid, deposited in The United States General Post Office, located at 33rd Street and 8th Avenue, New York, New York 10001, and addressed as follows:

Alexander Anolik, Esq.
693 Sutter Street
San Francisco, California 94109

Melvin Shinn
Suite 223, 33 S. King Street
Honolulu, Hawaii 96813

/s/ MICHAEL J. HOLLAND
Michael J. Holland

Sworn to before me this
12th day of March, 1976

/s/ *Lawrence Mentz*
Notary Public

Lawrence Mentz
Notary Public, State of New York
No. 31-4513579
Qualified in New York County

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1975

No. 75-1303

QANTAS AIRWAYS LIMITED,
Petitioner,

vs.

FOREMOST INTERNATIONAL TOURS, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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In the Supreme Court
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QANTAS AIRWAYS LIMITED,
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On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

Foremost International Tours, Inc., the plaintiff and appellee in the proceedings below, prays that the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case be denied.

QUESTION PRESENTED

The Question Presented by Qantas Airways Limited (hereinafter Qantas) should be clarified in two respects:

1. Qantas states:

"The District Court found that Qantas was selling below cost because Qantas was not including in its inclusive tour prices any of the normal airline overhead costs allocable to the inclusive tours in question." Petition at 2-3.

This is a misleading statement. That Qantas failed to allocate any of its general business expenses (fixed overhead and variable costs) as costs for the land services on its tours was not the only finding of the District Court. *See* Finding of Fact 17, *Foremost International Tours, Inc. v. Qantas Airways Limited,* 379 F.Supp. 88, 92 (D. Hawaii 1974), Appendix to petition at 37a. The Court also found, using Qantas' own figures, that Qantas was selling its tours below the actual cost to Qantas of the land components of the tour. In Finding of Fact 16, the District Court found that if the actual rate of exchange on April 1, 1974 (per the Bank of America) was used, the Qantas 14-day group inclusive tour to Australia selling at a price of $US 899.00 resulted in a loss to Qantas, 379 F.Supp. at 92, Appendix to petition at 36a.

2. Qantas also states that "the CAB took jurisdiction of most of the acts complained of." Petition at 3. In a Letter of Notice of Dismissal, in Part, dated December 15, 1975, the Bureau of Enforcement of the Civil Aeronautics Board gave notice that no enforcement proceeding would be instituted with regard to Foremost International Tours' (hereinafter Foremost) allegations that Qantas' activities constitute

violations of sections 402(a), 403(a), and 404(a) of the Federal Aviation Act (hereinafter Act), 49 U.S.C. sections 1372(a), 1373(a), and 1374(a). These allegations put into issue the legality of Qantas' activities as an "in-house" wholesale tour operator. The Bureau of Enforcement stated that the issues raised by these allegations would be more properly resolved by a petition to the Civil Aeronautics Board (hereinafter CAB) for rulemaking. The Bureau of Enforcement did docket a Petition for Enforcement with the CAB, incorporating Foremost's allegations that Qantas' activities constitute violations of sections 403(b), 404(b) and 411 of the Act, 49 U.S.C. sections 1373(b), 1374(b), and 1381.[1] *See generally,* Appendix to petition at 94a-106a.

STATUTES INVOLVED

Sections 408, 409 and 1002(j) of the Act, 49 U.S.C. sections 1378, 1379, and 1482(j) are not relevant to the issues of the present case.

STATEMENT OF THE CASE

With regard to Qantas' Statement of the Case, the following additions and clarifications should be made:

1. Since April 1, 1974, and the termination of its relationship with Qantas, Foremost has operated its

[1] In the Petition for Enforcement, the Bureau of Enforcement noted that the docketing of the Petition does not constitute "Board action." Appendix to petition at 94a.

inclusive tours to the South Pacific with Air New Zealand as the sponsoring and participating airline.

2. The preliminary injunction order which is the basis of this petition was entered on July 26, 1974. Motions to stay or suspend the injunction pending appeal were denied by the Court of Appeals for the Ninth Circuit and this Court. Subsequently, the District Court ordered that the preliminary injunction would be implemented on September 6, 1974.

On September 25 and 26, 1974, the District Court held a hearing to review, consider and determine whether the portion of the Qantas tour price applicable to land costs included the actual costs charged to Qantas and general business costs allocable to an in-house tour operation. At the conclusion of the hearing, the District Court:

> 1. provisionally vacated paragraph 5 of the Order of the Court dated July 26, 1974, so as to allow Qantas to sell the fly/drive tours at issue at the prices presented and approved by the Court at the hearing on September 25 and 26, 1974;
>
> 2. ordered Qantas to present to the Court on June 2, 1975, an accounting reflecting the actual sales experience of Qantas' inclusive tour program and the overhead and general administrative expenses incurred by Qantas for the operation of the land portion of the program during the period April 1, 1974 through March 31, 1975.

The above-mentioned accounting has not yet been presented to the Court.

3. The IATA Resolution to which Qantas refers in the third paragraph on page 5 of the petition is Reso-

lution 810d: Inclusive Tours Initiated by Members. *See* Appendix to this brief at pages i-v. Contrary to Qantas' parenthetical statement that 810d defines the principles under which inclusive tours may be *packaged* by IATA members, the meaning of 810d is far from clear. Additionally, the relevance, if any, to this case of the American Society of Travel Agents' objections to 810d is unclear from a reading of CAB Order E-24886.

4. Qantas states on pages 5-6 of the petition that it filed tariffs with the CAB incorporating the minimum South Pacific inclusive tour selling prices established by the IATA resolutions. The tariff under which Qantas operates its inclusive tours is a joint tariff which Qantas, in conjunction with approximately eighty-six other air carriers and foreign air carriers, files, through an agent, with the CAB. The tariff requirements for Air New Zealand, Foremost's sponsoring carrier, and Qantas Airways Limited, pursuant to the joint tariff, are exactly the same. Included in the tariff are the rules and regulations for the operation of an inclusive tour, including the minimum selling price of the tour per passenger. The tariff specifies the exact air fare to be charged for various tours. The tariff does not specify any charges for the land items which must be included in a tour (sleeping accommodations, sightseeing). There is only the formula for a price below which the tour may not be sold:

> ". . . the applicable group inclusive tour fare plus $130 ($90 for tours to/from Honolulu) for the minimum stay plus $10 for each day of the tour in excess of the minimum stay for which tour features are provided. . ."

5. On page 8 of the petition Qantas has misstated the findings of the District Court. The Court found not only that Qantas was not allocating normal business overhead costs to its inclusive tour prices, but also that Qantas was actually selling its 14-day group inclusive tour to Australia at a loss.

6. Contrary to Qantas' statement on page 9 of the petition, the third-party complaint which Foremost filed with the CAB was not "in every material way identical with the District Court Complaint." In addition to alleging that Qantas was engaging in unfair and deceptive practices and unfair methods of competition in violation of section 411 of the Act, 49 U.S.C. section 1381, Foremost also alleged violations of sections 402, 403(a), (b), 404(a)(2) and (b) of the Act, 49 U.S.C. sections 1372, 1373(a), (b), 1374(a)(2) and (b), and Parts 215.2, 221.3(a), 221.38(a), 221.53, 221.3(b), 223.2 and 223.8 of the CAB's Economic Regulations. *See* Appendix to petition at 74a-93a.

7. As mentioned above at pages 2-3, the CAB declined to institute an enforcement proceeding with regard to Qantas' alleged violations of sections 402 (a), 403(a), and 404(a) of the Act, and the relevant parts of the CAB's Economic Regulations. The CAB did docket a Petition for Enforcement incorporating Foremost's allegations that Qantas is in violation of sections 403(b), 404(b), and 411 of the Act.

ARGUMENT

1. THERE IS NO CONFLICT OF DECISION

The injunctive relief ordered by the District Court in this case was carefully fashioned to avoid a collision between the Court and the CAB. While recognizing that the expertise of the CAB would aid the Court in its adjudication, the Court also recognized that Foremost was threatened with immediate irreparable harm. The threat came from Qantas' practices, among others, of selling certain South Pacific inclusive tours below cost, failing to allocate any of its overhead expenses as costs of the land portion of the tours, and shifting of tours from Foremost to Qantas Holidays.[2]

> "The danger that Foremost will suffer irreparable injury before the CAB has investigated the charges of deceptive practices and unfair methods of competition is very real. Foremost has established that the existence of its business life as a competitor in the freewheeling tour market is threatened." *Foremost, supra,* 379 F.Supp. at 97 (D.Hawaii 1974), Appendix to petition at 47a.

The Court accommodated its equitable power to the initial jurisdiction of the CAB and confined its injunction to monitoring actual and general costs of Qantas on the land arrangements of its inclusive tours and Qantas' proven practice of shifting tours.

---

[2] "Shifting of tours" refers to certain practices of the Qantas reservation staff whereby persons requesting information on Foremost's Royal Road tours were furnished information relating to Qantas Holidays tours. On at least one occasion, a person specifically requesting a Royal Road tour was sold a Qantas Holidays tour. *See* Finding of Fact 21, *Foremost, supra,* 379 F.Supp. at 92, Appendix to petition at 37a.

The District Court molded its relief to preserve the status quo, *i.e.*, the existence of Foremost as a competitor in the South Pacific inclusive tour market. The Court issued this temporary relief because, although it concluded that the CAB had initial jurisdiction of many of the issues in Foremost's complaint, the CAB could *not* act quickly enough to assure Foremost's existence as a competitor. 379 F.Supp. at 96, Appendix to petition at 46a.

This finding of a need for temporary and immediate relief, and the corresponding lack of such a remedy in the CAB, was affirmed by the Court of Appeals for the Ninth Circuit. Appendix at page 28a-29a. Wrote Justice Barnes for the Ninth Circuit:

> "We are forced to conclude that Foremost might lose its entire business while attempting to get a cease and desist order under the mentioned statute [section 411 of the Act, 49 U.S.C. section 1381]." Court of Appeals Opinion, Appendix to petition at 29a, n. 4.

For the reasons discussed below, the injunction issued by the District Court did not interfere with the jurisdiction of the CAB. The decisions of the District Court and the Ninth Circuit in this case are consistent with the doctrine of primary jurisdiction as developed by the decisions of this Court. The petition for a writ of certiorari should be denied.

a. The Opinion of The Ninth Circuit is Consistent With Pan American World Airways, Inc. v. United States, 371 U.S. 296 (1963).

Qantas contends:

> "... the costing and marketing of inclusive air tours by airlines are within the pervasive authority of the CAB, and [that] *Pan American* and other decisions of this court bar the injunctive relief granted in this case by the District Court." Petition at 15.

Qantas' conclusion stems from too broad a reading of *Pan American.*

In the first place, neither *Pan American* nor *Hughes Tool Co. v. Trans World Airlines, Inc.,* 409 U.S. 363 (1973), upon which Qantas also relies, holds that the Federal Aviation Act completely displaces the antitrust laws. *Pan American, supra,* 371 U.S. at 304-305; *Hughes Tool Co., supra,* 409 U.S. at 387, 389. The exemptions to the antitrust law which the Act bestows are specific and limited.

Secondly, *Pan American* raised issues basic to the regulatory scheme of the Act. The United States filed a civil antitrust action for injunctive relief alleging that Pan American, W. R. Grace and Co., and Panagra had divided routes and territories in South America, that Pan American and Grace had conspired to monopolize air transportation, and that Pan American had prevented Panagra from extending its routes from the Canal Zone to the United States. This Court held that the narrow questions presented by the complaint were entrusted to the CAB.

> ". . . where the problem lies within the purview of the Board, as do questions of division of territories, the allocation of routes, and the affiliation of common carriers with air carriers, Congress must have intended to give it authority that was ample to deal with the evil at hand." 371 U.S. at 312.

The issues raised by the present case are not such "precise ingredients of the Board's authority." In controversy here are the actions of tour wholesalers, persons over which the Board has limited jurisdiction.[3] The heart of the controversy is the land costs for the inclusive tours—costs which are determined independently of air transportation fares which *are* at the heart of the regulatory scheme. The injunction at issue was directed to the land and general overhead costs, not the air fares.

Contrary to Qantas' argument at page 14 of the petition, the Ninth Circuit's holding that the inclusive tour business is not within the pervasive regulatory authority of the CAB did *not* conflict with the CAB's perception of its jurisdiction. The CAB has *not* promulgated regulations governing the activities of tour wholesalers such as are Foremost and Qantas.[4] The CAB regulations which Qantas cites, 14 C.F.R. Part 378 and 378a, do not regulate sellers of inclusive tours pursuant to the IATA Resolutions. They regulate the operation of inclusive tour *charters* by tour operators

[3] *See* Diederich, "Protection of Consumer Interests Under the Federal Aviation Act," 40 J. Air. L. & Comm. 1, 7 (1974).

[4] Qantas is also a foreign air carrier within the meaning of the Act.

who, in effect, are indirect air carriers within the meaning of the Act and, thus, subject to the Act's pervasive regulation.[5] The Ninth Circuit opinion is supported by the Bureau of Enforcement's Letter of Notice of Dismissal, In Part, dated December 15, 1975, at footnote 4:

> "A 'tour operator' can be defined as a business which prepares, operates, and markets on a 'wholesale' basis to travel agents, inclusive (package) tours for air transportation plus ground arrangements. An 'in-house' tour operation can be defined as a tour operator business conducted by a department or office of an air carrier or foreign air carrier, and not through a separate corporate or business structure. (These definitions are not the same as, and should not be confused with, the term 'tour operator' as used in several Parts of the Board's Regulations. Also 'inclusive tours', as used in this letter, should not be confused with 'inclusive tour charters' as used in Part 378 of the Board's Regulations)." Appendix to petition at 99a.

b. The Opinion of The Ninth Circuit is Consistent With Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363 (1973).

Qantas argues that the Ninth Circuit decision is in conflict with *Hughes Tool Co.* without making an affirmative showing of wherein lies the conflict. In

[5] The CAB enforcement proceeding in *Trans World Airlines, Inc., Flying Mercury, Inc.*, CAB Docket 24697, Order 73-6-9 (June 4, 1973) does not conflict with the Ninth Circuit decision because in *Flying Mercury* the airline and the tour wholesaler marketed an inclusive tour which failed to contain services actually required by the filed tariff. No such allegation has been made against Qantas in this case.

Hughes Tool Co., this Court held that where the CAB authorizes control of an air carrier by another person, and where the CAB authorizes (for sixteen years) specific transactions in the public interest, the transactions by virtue of section 408 and 414 of the Federal Aviation Act have immunity under the antitrust law. Mr. Justice Douglas, writing for the Court, stressed that every acquisition or lease of aircraft by TWA from Toolco during the years 1944 through 1960 required CAB approval. Everytime the CAB reviewed these transactions between the two companies, the CAB made a finding that such activities were "just and reasonable and in the public interest." 409 U.S. at 379. In addition to approving the actual transactions between the two companies, the CAB dealt with and approved the *way* in which Toolco used its power over TWA. As stated by Justice Douglas:

> "It adds nothing to the analysis to characterize Toolco's exercise of power over TWA as monopolization of the TWA market, for it was precisely such control that the Board opted for in 1944 and in 1950." 409 U.S. at 388.

The facts of the present case contain no such history of scrutiny and approval of Qantas' activities by the CAB. IATA Resolution 810d defines the principles under which inclusive tours may be operated by IATA members. The CAB first approved 810d in 1952. In 1967, by Order E-24886, the CAB denied a petition for CAB review of staff action in approving certain amendments to IATA Resolution 810d. *See* Letter of Notice of Dismissal, In Part, of the Civil Aeronautics Board, dated December 15, 1975, Appendix to petition at 104a. However, there is no indication in the CAB orders that the CAB reviewed or approved the way in which any IATA member, including Qantas, operates its own inclusive tours. In particular, no CAB approval of below cost pricing of land components of a tour has been issued. As the Bureau of Enforcement of the CAB noted in its letter of December 15, 1975:

> "This resolution [810d] was first approved by the Board in 1952, but it does not appear that the advantages and disadvantages of airline 'in-house' tour departments were considered in detail at that time or since." Appendix to petition at 104a.

Antitrust exemptions are narrowly construed. *Maryland and Virginia Milk Producers Assn. v. U.S.*, 362 U.S. 458 (1960). It can hardly be concluded, under the reasoning of *Hughes Tool Co.*, that antitrust immunity pursuant to section 414 of the Act is extended by means of a 1952 and 1967 general order of the CAB to predatory competitive practices such as Qantas exhibited in this case. See Court of Appeals Opinion, Appendix to petition at 25a; *Foremost, supra*, 379 F.Supp. at 94, Appendix to petition at 40a-41a.

c. United States Navigation Co. v. Cunard Steamship Co., 284 U.S. 474 (1932), Arrow Transportation Co. v. Southern Ry., 372 U.S. 658 (1963), and Section 1002(j) of the Act are inapposite to the legal and factual issues of this case.

In part 1c of the petition, Qantas argues that because the CAB has the power under section 1002(j)

of the Act, 49 U.S.C. section 1482(j), to suspend the operation of a tariff, the District Court was without the power to grant the injunctive relief which it ordered. In support of this argument Qantas primarily relies on *Arrow Transportation Co. v. Southern Ry., supra,* and *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973). Qantas has misconstrued the power of the CAB pursuant to section 1002(j) and misread the issues raised in *Arrow* and *SCRAP*.

Qantas argues:

> "... the action of the District Court barred Qantas from selling its tours in accordance with its tariff on file with the CAB, which tariff the CAB could suspend under 1002(j) of the Federal Aviation Act, 49 U.S.C. section 1482(j)." Petition at 20.

This is inaccurate. As discussed above, the tariff under which Qantas sells its inclusive tours is a joint tariff with other domestic and foreign air carriers. The tariff does contain specific fares for air transportation pursuant to an inclusive tour. It does *not* contain specific land fares, but only a formula for the minimum selling price of an inclusive tour per passenger. The injunction issued by the District Court did not bar Qantas from selling pursuant to its tariff (*i.e.,* suspend the tariff). It ordered Qantas to satisfy the Court that the selling price of a Qantas Holidays inclusive tour included actual land costs and an allowance for general business costs. If suspension of the tariff had been ordered by the District Court it would have barred not only Qantas from selling inclusive tours but also Foremost since Air New Zealand, the

Foremost sponsoring carrier, is a party to the same tariff.

Qantas misconstrues the *Arrow* and *SCRAP* cases because these cases concern the issue of reasonableness of a filed tariff. Foremost is not questioning the reasonableness of the Qantas tariff. The issue is a *violation* of a tariff.

The violation arises from Qantas' proven practice of selling its inclusive tours to the South Pacific below cost. The price of an inclusive tour includes a special air fare and certain land arrangements at the destination (*i.e.* hotel, car rental, sightseeing). Foremost submits that Qantas' practice of selling the land components of its tours below cost *cannot* be approved by the CAB. If, as the District Court summarized, Qantas is subsidizing the land arrangements of its tours with profits from the sale of its airplane seats, Qantas is violating its tariff by rebating the air fare. This practice is a violation of Section 403(b) of the Act, 49 U.S.C. section 1373(b). On the other hand, if Qantas' below cost selling is a rebate to the customer on the land arrangements, this is not within the regulatory authority of the CAB. Furthermore, it is below cost selling which, under the circumstances of this case, would be a violation of the antitrust laws. *See, Foremost, supra,* 379 F.Supp. at 97-98, n. 8, Appendix to petition at 49a, n. 8. Either way, the operation and marketing of Qantas' inclusive tours involve illegal conduct. In particular, if Qantas' practices are rebates on the air fare, it is conduct in violation of the Federal Aviation Act—conduct which has not been and cannot be approved by the CAB. Likewise, the

shifting of tours is an anticompetitive practice which can hardly be approved by the CAB.

In other words, Qantas' activities were not of such "debatable legality" that the Court should refrain from imposing injunctive relief in order to avoid a conflict with the CAB. *Carnation Co. v. Pacific Westbound Conference,* 383 U.S. 213 (1966). In *Carnation,* this Court held that activities which are clearly unlawful under a regulatory scheme are subject to antitrust sanctions so long as the court refrains from action which might interfere with the regulatory agency's exercise of its lawful powers. 383 U.S. at 221. In the case at bar, the District Court's limited injunctive order to protect Foremost precluded any interference with the regulatory authority of the CAB.

The issue in *Arrow* was the lawfulness and reasonableness of railroad rates. Congress had given the Interstate Commerce Commission (ICC) the power, pursuant to 49 U.S.C. section 15(7), to suspend a proposed rate schedule pending the ICC's determination as to whether the rate was lawful. When the ICC failed to make a decision on the reasonableness of the rates for the twelve months following their suspension, the railroads announced they would put the proposed rates into effect. Arrow filed a lawsuit to enjoin the railroads. This Court held that the Interstate Commerce Act rested in the ICC the exclusive power to suspend the railroad rates. Any preexisting powers to grant injunctive relief had been withdrawn from the courts. *Arrow Transportation Co., supra,* 372 U.S. at 667.

Likewise, the *SCRAP* case involved a question of reasonable railroad rates. This Court found that the factual distinctions between *SCRAP* and *Arrow* were inconsequential and, as in *Arrow,* the issuance of an injunction to suspend rates constituted a direct interference with the jurisdiction of the ICC. *SCRAP, supra,* 412 U.S. at 690-699.

Neither of these cases supports Qantas' argument. The power which the CAB holds pursuant to section 1002(j) of the Act is the power to suspend or reject tariffs in international air transportation to and from the United States. Contained in these tariffs are air fares for regularly scheduled flights and formulae for determining the minimum selling price of inclusive tours—neither of which are challenged in the present case. Neither the cost of the land components, nor the market price of the land components, is an element of the tariff. The CAB does not have the power under section 1002(j), or any other section of the Act, to suspend or modify the prices of the land components of the package. As stated by the Ninth Circuit and the District Court, neither the Act nor the CAB regulations authorizes the CAB to grant the preliminary relief necessary to protect Foremost. Court of Appeals Opinion, Appendix to petition at 29a; *Foremost, supra,* 379 F.Supp. at 96, Appendix to petition at 46a. The injunctive relief which the District Court fashioned in this case was not prohibited by previous decisions of this Court or by the Federal Aviation Act.

Qantas also argues that the decision in the present case conflicts with *United States Navigation Co. v.*

Cunard Steamship Co., 284 U.S. 474 (1932). However, *Cunard* involved the reasonableness of contract shipping rates—issues which, like *Pan American,* were basic to the regulatory scheme.

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2. THE DECISIONS BELOW ARE CORRECT

The decisions of the courts below properly applied both the doctrine of primary jurisdiction and the traditional equitable power of a federal court.

The doctrine of primary jurisdiction is not an inflexible doctrine as Qantas' argument suggests. It is a doctrine of accommodation between the court, where jurisdiction of the lawsuit originally lies, and an administrative agency, which has the duty of administering a regulatory scheme. As recognized by the District Court and the Ninth Circuit, resort to the primary jurisdiction of an agency does not preclude a court from issuing equitable relief to preserve the status quo. *Wheelabrator Corporation v. Chafee,* 455 F.2d 1306, 1316-1317 (D.C.C. 1971).

> ". . . the outstanding feature of the doctrine is properly said to be its flexibility permitting the courts to make a workable allocation of business between themselves and the agencies." *Civil Aeronautics Board v. Modern Air Transportation, Inc.,* 179 F.2d 622, 625 (2d Cir. 1950).

In the present case the District Court used this flexibility to preserve Foremost's economic life without material harm to Qantas. Foremost had prayed for an injunction restraining Qantas from acting in any manner whatsoever as a wholesale tour operator.

Complaint, Appendix to petition at 72a. However, the District Court decided that it needed the aid and expertise of the CAB with regard to certain of Qantas' tour operator activities. It limited the injunction to restraining the sale of Qantas' inclusive tours until:

> ". . . [Qantas] has satisfied this court that the portion of the tour price applicable to the land costs includes not only the actual costs charged to Qantas for the land services . . . but also generally including, but not limited to, administration expenses, office expenses, salaries, general in-house expenses and, possibly, advertising and brochure costs, related to Qantas' [sic] Holiday tours." 379 F.Supp. at 98-99, Appendix to petition at 51a.

In September, 1974, Qantas presented revised tour prices to the District Court and the injunction was vacated.

The Ninth Circuit correctly affirmed the narrow injunction which the District Court had fashioned. The Ninth Circuit decision recognizes that the CAB does *not* have pervasive regulatory authority over the wholesale inclusive tour business and that the District Court issued injunctive relief proper under the circumstances of this case. Court of Appeals Opinion, Appendix to petition at 26a-27a.

Qantas argues that the facts of this case preclude the Court from issuing any type of injunctive relief and that the relief granted was "unprecedented." However, the cases which Qantas relies on do not support its argument.

S.S.W., Inc. v. Air Transport Ass'n. of America, 191 F.2d 658 (D.C.C. 1951), *cert. denied,* 343 U.S. 955 (1952), was a case akin to *Pan American,* where the activities complained of were "basic in [the] regulatory scheme" of the Federal Aviation Act. *Pan American, supra,* 371 U.S. at 305. Such are not the facts of the present case.

Laveson v. Trans World Airlines, Inc., 471 F.2d 76 (3d Cir. 1972) involved the reasonableness of charges for inflight movie entertainment. The CAB had been considering the question for five years before the lawsuit. The "headset controversy," as the court termed it, was basic to the regulatory scheme because of its direct impact on air fares. *Id.* at 80. In the present case the injunction did not affect the inclusive tour air fares or any other element of the CAB's regulatory authority.

The injunction in *Delaware River Port Authority v. Transamerican Trail. Tr., Inc.,* 501 F.2d 917 (3d Cir. 1974) was reversed because the plaintiffs failed to show a probability of success on the merits of the litigation. *Id.* at 923-24. In the present case, both the District Court and the Ninth Circuit found Foremost demonstrated a probability of success on the merits. Court of Appeals Opinion, Appendix to petition at 29a; *Foremost, supra,* 379 F.Supp. at 97-98, n. 8, Appendix to petition at 49a, n. 8.

MCI Communications Corp. v. American Tel. & Tel. Co., 496 F.2d 214 (3d Cir. 1974), involved a question of clarification of the meaning of recent orders of the FCC. The case suggests that there are situations

when an injunction may issue despite the primary jurisdiction of an administrative agency. *Cf., MCI Communications Corp., supra,* 496 F.2d at 220.

Carter v. Am. Tel. and Telegraph Co., 365 F.2d 486 (5th Cir. 1966), like *Arrow* and *SCRAP, supra,* involved issues of the reasonableness and applicability of a filed tariff—questions peculiarly within the jurisdiction of an administrative agency.

Qantas makes much of the fact that in *Wheelabrator Corporation v. Chafee, supra,* the General Accounting Office's decision did not operate as a legal determination of the rights of the parties. However, the District of Columbia Circuit reasoned that this did not preclude injunctive relief by a district court since the expertise of the agency was the "life and reason of the primary jurisdiction rule." 455 F.2d at 1316.

> "The preliminary injunction may be used to preserve the status quo and while securing for the court the benefit of the GAO's expertise. Where a court has warrant for issuing an injunction pending GAO determination it may be able to obviate the objection sometimes leveled at GAO's procedure, that the time required sometimes renders the matter moot prior to GAO's determination." *Id.* at 1316.

This decision, relied on by the Ninth Circuit, directly supports the injunctive relief which the District Court ordered against Qantas. The District Court felt that the expertise of the CAB could aid it in deciding Foremost's antitrust suit. However, to enable Foremost to weather the conduct complained of,

a preliminary injunction was necessary pending the referral to the CAB.

That the decision of the District Court may be unprecedented is not a reason for this Court to grant certiorari if authority for the decision can be found in prior decisions of this Court and the federal appellate courts. *Cf.*, Supreme Court Rule 19; *Arrow Transportation Co., supra,* 372 U.S. at 671, n. 22.

The injunctive relief granted in this case was entirely proper and did not intrude upon the regulatory authority of the CAB. Rather, it was an orderly coordination of the traditional equity power of the federal courts and the authority of the CAB to render any expertise it may have regarding the wholesale inclusive tour business.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case be denied.

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Counsel for Respondent
Foremost International Tours, Inc.

SUZANNE M. MCDONNELL,
MELVIN Y. SHINN,
Of Counsel.

Dated, April 12, 1976

(Appendix Follows)

APPENDIX

Appendix

IATA RESOLUTION 810d

Inclusive Tours Initiated by Members

180/810d (amended) Expiry: Indefinite
314/810d (amended) Type: B

RESOLVED that, the term 'inclusive tours' as used in Resolution 810a to determine the eligibility of an IATA Sales Agency for additional commission, when initiated by one or more IATA Members, shall be defined in accordance with the following principles:

(a) TC1 ONLY tours shall provide for round trip and circle [t]rip transportation, wholly or partially over the lines of one or more Members, and shall include in their published price features such as hotel accommodations and other facilities and attractions. The tour features, in addition to the air transportation included in the total price, must not amount to less than 20% of the air fare or US$15, whichever is greater;

(a) TC3 ONLY tours shall provide for round trip and circle trip transportation, wholly or partially over the lines of one or more Members, and shall include in their published price features such as hotel accommodations and other facilities and attractions. The tour features, in addition to the air transportation included in the total price, must not amount to less than 20% of the air fare or UK£5.85, whichever is greater;

(b) tours must be advertised under the names of the initiating Member(s);

(c) the initiating Member(s) shall obtain approval of all participating Members before authorizing the tour;

(d) trade titles or reference numbers (tour codes pursuant to Resolution 275e) of the approved tours must be quoted on air tickets or exchange orders and at least once in a prominent position on other travel documents including the tour folder as [sic] booklets;

(e) the travel documents must be shown upon any Member's request at the time of travel;

(f) reasonable modification of a tour may be permitted to meet passenger's convenience or abnormal circumstances;

(g) the initiating Member(s) must advertise the tour by means of folders or booklets;

(h) it must be evident that the folder or booklet is an official piece of literature of the Member(s). The front cover shall show only the name of the Member(s) and provide space for the name of an agent only in the customary box on the back cover. The name of the tour operator shall appear only in the 'conditions' of the folder;

(i) the folder or booklet must include at least one representative illustration or map;

(j) the folder or booklet shall name all Members participating in the inclusive tour;

(k) the initiating Member must print and distribute sufficient copies of any approved tour folder or booklet and must reissue such additional quantities of tour folders or booklets as may from time to time be necessary to continue the promotion and sale of the tour. Any folder or booklets promoting tours on a year round basis must be issued annually in quantities of at least 3,000 and such annual reissue must be approved, as provided in Subparagraph (c). All tour folders must show either an effective date of departure of [sic] the date of printing;

(l) any Member may request the appropriate Agency Administration Board to review the tour folders, booklets or alternative advertising referred to in Subparagraph (g) and to determine whether they satisfy the requirements set forth herein. Upon disapproval of any tour folder, booklet or alternative advertising by the Agency Administration Board, the participating Members shall immediately discontinue payment of the additional commission provided for in this Resolution on the tour contained in the tour folder, booklet, or alternative advertising, thus disapproved;

(m) TC1 ONLY except as provided in Resolutions JT12(36)810d and JT123(30)810d, the provisions of this resolution shall apply only to tours sold within the area of TC1 for

transportation wholly within that area and for transportation from TC1 to TC2 and/or TC3 and return;

(m) TC3 ONLY the provisions of this Resolution shall apply only to tours sold within the area of TC3 for transportation wholly within that area, for transportation from Japan, Australasia [sic] or Okinawa to points in TC2 and/or TC1 and return, and for transportation originating in TC3 to points in TC1 via the Pacific and return;

(n) nothing herein shall be deemed to preclude application of the provisions hereof to inclusive tours which are performed partly by surface transportation and partly by air transportation;

(o) notwithstanding anything in the preamble hereof, a Member may pay to its General Passenger Sales Agent(s) or to an air or surface carrier with which it has an interline traffic agreement or other form of agreement authorizing the sale of international air transportation, an additional commission as authorized to Passenger Sales Agents in Resolution 810a; provided that the provisions of Subparagraphs (a) to (n) above are complied with.

GOVERNMENT RESERVATIONS

Consult Government Reservations Section

GOVERNMENT RESERVATIONS:

810d

UNITED STATES

Order E-12305 dated 31 March 1958:

The provisions of Resolution 810d authorizing reasonable modification of a tour are limited to minor adjustments, involve no extra expenses to the carrier, and are applied alike to all passengers, and the Resolution will be subject to further review if evidence appears of inequitable application of such provision.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1303

QANTAS AIRWAYS LIMITED,

Petitioner,

v.

FOREMOST INTERNATIONAL TOURS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Petitioner, Qantas Airways Limited (hereinafter Qantas) submits this Reply Brief pursuant to Supreme Court Rule 24(4) in support of its Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

• • •

This Brief is submitted because Respondent, in its discussion of the rulings of the District Court and the Ninth Circuit and the matters pending before the Civil Aeronautics Board (CAB), erroneously suggests that no collision of the administrative and judicial regimes is possible in this case.

Respondent also mistakenly states that the CAB, under §1002(j)(2) of the Federal Aviation Act, 49 U.S.C.

§1482(j)(2), is without power to suspend the tariff of Qantas (providing for minimum selling prices for its inclusive air tours) filed jointly with other foreign air carriers, without suspending the tariffs of the other carriers.

I. While Respondent points out that the CAB did not take jurisdiction over *all* of the matters alleged in the District Court Complaint in this case (Brief of Respondent, p. 6), Respondent did not directly address the fact that the CAB took jurisdiction under §411 of the Federal Aviation Act of the very *acts enjoined* by the District Court. Nor did Respondent address the fact that, after a full hearing, the District Court found that the acts enjoined were within the initial jurisdiction of the CAB.

While the Ninth Circuit held that the "tour industry" is not *per se* regulated by the CAB (Appendix, p. 24a), the Ninth Circuit did not hold that the acts enjoined were *not* within the jurisdiction of the CAB. The Ninth Circuit held that where the activities of an airline affect persons in an industry not *per se* regulated by the CAB, the Courts can act.

In so holding, the Ninth Circuit has placed unprecedented "intra-industry" limitations on the CAB's pervasive regulatory authority over statutorily defined aspects of the airline industry. *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963).[1]

The "basic principles" of *Pan American* as enunciated by the Ninth Circuit (see Appendix p. 21a) that the CAB has pervasive regulatory authority only "where the anti-

[1] The portion of the *Pan American* opinion quoted by Respondent in its Brief refers to the Board's statutory authority over the "affiliation of common carriers with air carriers"—"common carriers", however, which are in an industry other than air transportation. Brief of Respondent, p. 10.

competitive effects of the complained of action were *confined* to, and primarily affected the regulated industry", are without support in *Pan American.* Rather, *Pan American* holds that the CAB has pervasive regulatory authority over statutorily defined aspects of the airline industry, notwithstanding possible effects on other industries, which effects must, however, be considered by the CAB "in the public interest."

The decision of the Ninth Circuit is in direct conflict with *Pan American,* and sends this case on a "collision course" which this Court held must be avoided.

Under the Ninth Circuit's decision, followed to its logical conclusion, any ruling of the CAB in this case under §411 of the Federal Aviation Act would have no binding effect on the Courts because it would "affect" a firm in an "unregulated industry". Qantas may be exonerated by the CAB under §411 or be compelled by a cease and desist order to alter its practice of selling its air tours, and yet still be subject to injunctive relief by the Courts, according to the Ninth Circuit.

Since the CAB may find that Qantas did not engage in the *practice* of "shifting" or misappropriating tour business, and may find that under applicable costing factors in the airline industry, Qantas was not selling below cost, injunctive relief by the Court is barred by the applicable decisions of this Court.

The Respondent, as did the Ninth Circuit, speaks in broad categories of the "tour industry" and "airline industry", as if there were no overlapping areas, or as if inclusive tours involving air transportation are part of one, but not the other "industry".

Under *Pan American* and *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363 (1973), the focus is not

upon the airline industry *vis a vis* other industries. The focus is upon the acts or transactions of the airline involved in the case and whether they come within the statutorily defined pervasive regulatory authority of the CAB. The CAB in this case has taken jurisdiction over the acts or transactions at issue in this case—the sale by a regulated carrier of inclusive tours involving air transportation.

In the context of the acts which were enjoined in this case over which the CAB has now taken jurisdiction, Respondent's principal argument that this case is consistent with *Pan American* fails and is without meaning. Respondent stated:

> "[T]he Ninth Circuit's holding that the inclusive tour business is not within the pervasive regulatory authority of the CAB did *not* conflict with the CAB's perception of its jurisdiction." Brief of Respondent, p. 10.

II. Respondent did not address itself to Petitioner's contention that the Ninth Circuit's decision conflicted with *Hughes Tool Co.* In that case, this Court upheld the antitrust immunity conferred by the CAB under §414 of the Federal Aviation Act, even where a firm in another, but related industry, was affected. Rather, Respondent discusses the Board's approval of IATA Resolution 810d, which is not directly involved in the injunctive relief granted in this case. IATA Resolution 810d, approved by the CAB under §412 of the Federal Aviation Act, permitted air carriers to package their own inclusive tours involving air transportation.

The IATA Resolution approved by the CAB under §412 of the Act which *is* directly involved is that resolution providing a minimum selling price formula for inclusive air tours. Brief of Petitioner, p. 5.

This CAB-approved resolution was incorporated into Qantas' tariffs and Qantas sold the tours involved in this case in accordance with that minimum selling price formula. To avoid *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 658 (1963), *United States* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973) and the primary jurisdiction of the CAB, Respondent incorrectly states that "Foremost is not questioning the reasonableness of the Qantas tariff. The issue is a *violation* of a tariff." Brief of Respondent, p. 15.

On the contrary, Respondent has not disputed that Qantas met the minimum selling price formula. Rather, Respondent has questioned whether Qantas should be permitted to sell inclusive air tours "below cost" (which Qantas denies), even if it meets the minimum pricing formula approved by the CAB.

If such pricing, provided for in Qantas' tariffs, is "predatory" or unfair, under §1002(j)(2) of the Federal Aviation Act, 49 U.S.C. §1482(j)(2), the CAB clearly has the power to suspend the Qantas tariff. The CAB, in addition, could determine to accept only a Qantas tariff providing for a higher minimum selling price. In effect, the CAB would be requiring Qantas to raise the prices of its tours, just as the District Court ordered in this case. Moreover, should the CAB determine that speedy relief was necessary to prevent harm to Foremost, the CAB has the power and authority to seek injunctive relief in the District Court under §1007 of the Act, 49 U.S.C. §1487.

> "One of the obvious purposes of providing that the CAB may bring suit in district court is to ensure a speedy enforcement of the Act . . ." *Civil Aeronautics Board* v. *Aeromatic Travel Corp.*, 489 F.2d 251, 254 (2d Cir. 1974).

In this regard, the *Arrow* and *SCRAP* cases become important. Those cases hold that the ICC's tariff suspension power, identical to that of the CAB in this case, was inconsistent with the power of a District Court to grant injunctive relief relating to such matters.

Trying again to avoid the impact of *Arrow* and *SCRAP*, Respondent states at pages 5, 14 and 15 of its Brief that the CAB could not have suspended the Qantas inclusive tour tariff to the South Pacific, because such a suspension would have suspended the operations of all carriers who were parties to the joint tariff, including Air New Zealand, the current sponsoring carrier for Foremost's tours to the South Pacific. This is error. There is no such statutory limitation placed upon the CAB.

A Qantas pricing practice may be suspended under §1002 (j) of the Act without affecting the tariffs filed either jointly or independently by any other air carrier. The suspension power under §1002(j) does not *require* the CAB to suspend the tariff as to all carriers who are parties to the tariff.

III. Finally, the Brief of Respondent does not dispute that the question presented for review by Petitioner is an important question, fundamental to this litigation and ripe for decision by this court, namely:

> "Whether, pending determination by the Civil Aeronautics Board of alleged anticompetitive practices within its jurisdiction under §411 of the Federal Aviation Act, a District Court may under the Clayton Act enjoin a foreign air carrier with respect to those practices." Brief of Petitioner, p. 3.

Respondent acknowledges that action of the District Court and the Ninth Circuit in this case was "unprecedented". Brief of Respondent, p. 22. It is unprecedented not because the situation has never arisen, but because Courts, until the present case, have withheld antitrust injunctive relief regarding matters within the jurisdiction of an agency having pervasive regulatory authority.

CONCLUSION

It is respectfully submitted that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case, as prayed for herein.

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Of counsel:

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Affidavit of Service

I, MICHAEL J. HOLLAND, being over the age of 18 years, an associate attorney employed by the firm of Condon & Forsyth, hereby certify that I have this 28th day of April, 1976, served three copies of the foregoing Reply Brief upon Respondent Foremost International Tours, Inc., by mailing copies thereof to its attorneys of record in sealed envelopes, with air mail postage prepaid, deposited in The United States General Post Office, located at 33rd Street and 8th Avenue, New York, New York 10001, and addressed as follows:

Alexander Anolik, Esq.
693 Sutter Street
San Francisco, California 94109

Melvin Shinn
Suite 223, 33 S. King Street
Honolulu, Hawaii 96813

/s/ MICHAEL J. HOLLAND
Michael J. Holland

Sworn to before me this
28th day of April, 1976

/s/ LAWRENCE MENTZ
Notary Public

Lawrence Mentz
Notary Public, State of New York
No. 31-4513579
Qualified in New York County

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

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Petitioner,

v.

FOREMOST INTERNATIONAL TOURS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY OF PETITIONER TO THE MEMORANDUM FOR THE UNITED STATES AS *AMICUS CURIAE*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1303

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This Reply is filed by Petitioner in response to the Memorandum for the United States as Amicus Curiae.

The Memorandum for the United States evidences either:

a misconception as to the question which Petitioner seeks to have the Court review on certiorari;

a misunderstanding of the nature of the "below cost" selling which is the subject of the preliminary injunction granted by the District Court;

a misconception as to the jurisdiction of the CAB to regulate all aspects of inclusive tours; or

a present desire by the Civil Aeronautics Board (CAB) to avoid exercising the jurisdiction and powers conferred upon it by the Federal Aviation Act.

Discussion

1. The question presented by the Petition is simply whether a district court should grant antitrust injunctive relief with respect to matters recognized to be within the initial jurisdiction of the CAB and which have been referred by the district court to the CAB for initial determination. The Memorandum for the United States fails to make mention of the fact that, since the filing of the Petition, the CAB has held an extensive evidentiary hearing[1] with respect to the very matter which is the subject of the preliminary injunction granted by the District Court, namely "below cost" selling. This hearing was held from May 17 to May 26, 1976 and it is surprising to Petitioner that no mention of this is made in the Memorandum of the United States since the CAB has apparently contributed substantially to the Memorandum.

If the CAB determines as a result of that evidentiary hearing that Qantas has not, in fact, sold its inclusive tours "below cost" and that an airline is not required, in the public interest, to allocate normal airline administrative and overhead expenses to the land portion of inclusive tours, there will be a direct conflict between the holding of the District Court and the CAB on an air transportation economic policy matter. It is this type of collision between judicial and administrative regimes which

[1] Pursuant to a Petition for Enforcement which is set forth in full in the Appendix to the Petition, pages 94a-97a. The Third Party Complaint pursuant to which the Petition for Enforcement was filed is set forth in the Appendix to the Petition at pages 74a-93a.

the Court has indicated should be avoided by deferring to the administrative agency those matters clearly within the experience and expertise of the agency. *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963); *Far East Conference* v. *United States*, 342 U.S. 570 (1952). See also, *United States* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973); *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 658 (1963).

The underlying objective of this doctrine of primary jurisdiction is to insure uniformity and consistency in the regulation of the industry entrusted to the particular agency. *Far East Conference* v. *United States*, 342 U.S. 570, 574 (1952). The objective of uniformity and consistency in the regulation of the air transportation industry will not be achieved if it is left to district judges, of whom there are over 500, to determine *what* airline overhead and administrative expenses should be allocated to the land portion of inclusive tours, *if any*, and *to what extent*. This is one of the basic questions which will be decided by the CAB as a result of the evidentiary hearing recently concluded. The fact that the District Court has provisionally vacated the preliminary injunction, after directing that Qantas increase its prices to a level satisfactory to the District Court, is irrelevant to the question of whether the District Court should have exercised its antitrust jurisdiction to determine matters recognized as being within the initial jurisdiction of the CAB before the CAB had been given an opportunity to act.

The Court in *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213 (1966) recognized the principles of the *Far East* and *Cunard* cases (cited in the Petition but ignored by the United States in its Memorandum) that district courts should not issue injunctions with respect to

conduct which an administrative agency *can* and *may* subsequently approve.

2. The Memorandum for the United States, while repeatedly referring to "below cost" selling, as determined by the District Court in granting the preliminary injunction, does not at any time describe the "costs" with which the District Court was concerned.

The preliminary injunction is clear that the costs involved are airline "administration expenses, office expenses, salaries, general in-house expenses and, possibly advertising and brochure costs" related to the land portion of the inclusive tours involved (Pet. App. 51a). The "costs" involved do not relate to the actual charges to Qantas for the land services included in the inclusive tour package. One of the issues litigated in the hearing before the CAB in May, 1976 was the basic policy question whether airline administrative and overhead expenses should, in the public interest, be allocated to the direct land costs of the inclusive tour, *i.e.*, the costs charged to Qantas by the suppliers of the land components. If it is determined by the CAB that airline administrative and overhead expenses should be so allocated, the further question to be decided by the CAB is—to what extent?

The District Court already has ruled, in granting the preliminary injunction and subsequently provisionally vacating the preliminary injunction, that airline administrative and overhead expenses should be included in the tour price to the public, not to benefit the public but to protect independent tour operators such as Foremost. The District Court has also determined the extent of the mark-up that should be included in the tour price to the public to cover such expenses. The objective of uniformity and consistency in the regulation of the air transportation in-

dustry, which has been entrusted to the CAB by Congress, will not be achieved if it is left to individual district courts to determine these matters.

Section 102 of the Act directs the CAB, in exercising and performing its powers and duties, to consider, as being in the public interest, the following, among other things:

> "(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;
>
> • • • • •
>
> (d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the United States Postal Service, and of the national defense." 49 U.S.C. 1302(b), (d).

In deciding whether to exercise its recently granted suspension power with respect to rates, fares, charges or practices affecting same, the CAB has been directed by Congress to take into consideration, among other factors:

> "(B) the need in the public interest of adequate and efficient transportation of persons and property by air carriers and foreign air carriers at the lowest cost consistent with the furnishing of such service;
>
> • • • • •
>
> (E) the need of such air carrier and foreign air carrier for revenue sufficient to enable such air carrier and foreign air carrier, under honest, economical, and

efficient management, to provide adequate and efficient air carrier and foreign air carrier service; and

(F) whether such rates will be predatory or tend to monopolize competition among air carriers and foreign air carriers in foreign air transportation. 49 U.S.C. 1482(j)(5)(B), (E) and (F).

The determination of questions of economic policy, such as the elements of cost to be included in the price of an inclusive air tour package, lies at the very heart of the CAB's mandate from Congress to regulate, in the public interest, the economics of the air transportation industry. As recognized in the Memorandum for the United States, an inclusive tour air fare cannot be sold without the minimum land component package required by the CAB and approved tariffs. The CAB has been heavily involved in the establishment of promotional or discount air fares and in approving a fare structure which includes promotional and discount air fares, the CAB has determined the airline cost factors which must be met by the fare. See, Domestic Passenger Fare Investigation (DPFI)—Phase 5, *Discount Fares*, Order 72-12-18 (1972).

Clearly, the question of whether normal airline administrative and overhead expenses should be allocated to the direct costs of the land portion of an inclusive air tour involves "the validity of a rate or practice" included in the tariffs of Qantas filed with the CAB, involves "technical questions of fact uniquely within the expertise and experience" of the CAB, involves "an assessment of industry conditions" and is a question with respect to which considerations of uniformity and consistency in regulation require reference to the CAB prior to the granting of any antitrust injunctive relief. See, *Nader* v. *Allegheny Airlines, Inc.*, —— U.S. ——, 48 L. Ed. 2d 643 (1976).

The Memorandum for the United States finds it "a reasonable and desirable accommodation of the interests involved" for the District Court to have granted a preliminary injunction to protect Foremost as a competitor in the inclusive tour business while the CAB deals with the identical issues. (Mem. 11). The paradox created by this unprecedented approach is emphasized by the recognition of the District Court that "any portions of the preliminary injunction . . . jointly acted upon" will be terminated by the District Court! 379 F. Supp. 88 at 96, fn. 7. (Pet. App. 46a-47a). In the interim, however, and while CAB action is awaited, the industry is placed in a state of uncertainty, the objectives of uniformity and consistency in the regulation of this economic aspect of the industry are thwarted and, in the event the CAB finds contrary to the District Court, Qantas will have been irreparably prejudiced.

The Act requires the CAB to protect the public interest, and not the private interests of any individual, person or company. *American Airlines, Inc.* v. *North American Airlines, Inc.*, 351 U.S. 79 (1956). It is again surprising to Petitioner that the CAB is not seeking to protect and preserve its own jurisdiction, duty and responsibility to decide as a matter of policy the very questions dealt with by the District Court in the granting of the preliminary injunction. The interests dealt with in the District Court do not include the public interest in having available transportation "at the lowest cost consistent with the furnishing of such service", an interest which Congress has directed the CAB to consider and protect in regulating the air transportation industry. 49 U.S.C. 1482(j)(5)(B).

3. The CAB does have the power to regulate all aspects of the inclusive tour industry and the fact that the CAB evidently does not wish to exercise the full extent of its

powers is irrelevant in determining whether the District Court properly granted preliminary antitrust relief pending CAB action on the identical subject matter. Contrary to the representations contained in the Memorandum for the United States, the CAB *has* undertaken to regulate the manner by which inclusive air tours are advertised and sold and has not limited its regulatory function in this area to "tariff-related" matters. In *Trans World Airlines, Inc., Flying Mercury, Inc.* Enforcement Proceeding, CAB Docket 24697, Order 73-6-9 (1973), the CAB, acting pursuant to Section 411 of the Act,[2] ordered TWA and Flying Mercury to cease and desist from:

> "engaging in unfair or deceptive practices and unfair methods of competition within the meaning of section 411 of the Act by offering, selling and operating GIT's in air transportation, under terms, conditions, and restrictions that do not conform to those in its promotional materials and which are such as to make required sleeping accommodations not reasonably available to the average participant." Order 73-6-9, p. 7.

The action of the CAB in dealing with the "throwaway" program in the *TWA-Flying Mercury* case is directly contrary to the representation in the Memorandum for the United States in footnote 4 at page 3 as to how the CAB would undertake to deal with such a matter. As Order 73-6-9 clearly indicates, the disapproval by the CAB of the throwaway program was not based upon a determination that the "air fare was too low in light of the conditions on its availability" but rather was based upon a determination that TWA and Flying Mercury were not using the promotional inclusive tour air fare as envisaged by the CAB when it was approved.

[2] 49 USC 1381.

4. The Memorandum for the United States argues that any similarity between this case and *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363 (1973) "is more apparent than real." (Mem. 10). The position seems to be that no antitrust immunity attaches under Section 414 of the Act[3] to CAB approval of minimum land component prices because the CAB "did not analyze in any detail the land services to be offered by Qantas but considered them only to the extent necessary to assure that the conditions for availability of the tour-basing air fare had been met." (Mem. 10).

No authority is cited in support of this position or for the proposition that each Order approved by the CAB pursuant to Section 412 of the Act[4] must be scrutinized with specificity by the CAB before antitrust immunity attaches under Section 414 of the Act. The cases which have been decided post *Hughes* have imposed no such condition on the conferring of Section 414 immunity. *Grueninger International Travel, Inc.* v. *Air Transport Association of America*, 405 F.Supp. 1241 (D.D.C. 1976); *Lowe* v. *International Air Transport Association*, 13 CCH Av.L.Rep. 18,214 (S.D.N.Y. 1976); *Scroggins* v. *Air Cargo Inc.*, 13 CCH Av.L.Rep. 17,469 (N.D. Ga. 1974); *Beltz Travel Service, Inc.* v. *Air Transport Association of America*, 13 CCH Av.L.Rep. 17,242 (N.D. Cal. 1974).

In *Grueninger*, the plaintiff argued that *Hughes* was distinguishable because the CAB in *Hughes* had scrutinized virtually every business transaction between Hughes and TWA. The court rejected this rationale and held that so long as the CAB had supervised the activities in controversy, immunity from the antitrust laws will be afforded.

[3] 49 USC 1384.

[4] 49 USC 1382.

405 F.Supp. at 1243. The *Scroggins* court dismissed the complaint of plaintiff where a number of airlines had agreed to have one air cargo carrier act as agents for all airlines at one airport. The Agreement had been approved by the CAB under Section 412 of the Act and the court rejected plaintiff's contention that antitrust immunity was not conferred under Section 414, holding:

> "Such an argument does not stand up against the holding in Hughes. There the Court made it clear that immunity under Section 414 does not depend upon explicit approval of the conduct complained of." 13 CCH Av.L.Rep. at 17,471.

The Memorandum of the United States does not dispute the fact that the prices of the inclusive tours of Qantas at issue in this proceeding complied with currently effective tariffs filed with the CAB. These tariffs were filed in implementation of an agreement of the International Air Transport Association (IATA) which had been filed with and approved by the CAB under Section 412 of the Act. This CAB approved IATA agreement set forth the tour basing fare to be charged by Qantas as well as the minimum price for the required land arrangements. (Mem. 5).

Hughes does not require explicit approval of the conduct complained of before Section 414 antitrust immunity applies. Section 414 of the Act confers antitrust immunity to any person affected by an Order of the CAB approving an agreement filed under Section 412 of the Act. To argue that the statutory immunity does not apply unless the CAB has sufficiently scrutinized the agreement it has approved is to read into Section 414 of the Act a condition which is simply not warranted and which has not to date found judicial acceptance. It would be difficult for anyone such as Petitioner to devise a proceeding through which a determination could be made as to whether the CAB had sufficiently scrutinized the agreement approved before acting pursuant to it.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Certificate of Service

I hereby certify that I have this 13th day of September, 1976 served the foregoing reply to the Memorandum for the United States upon respondent and the United States, *amicus curiae*, by depositing same in a United States mail box at 1251 Avenue of the Americas, New York, New York 10020, with first class postage prepaid, addressed as follows:

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MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This Memorandum is filed in response to the Court's order of May 3, 1976, inviting the Solicitor General to express the views of the United States.

STATEMENT

The relevant facts, proceedings below, statutory provisions, and related Board orders are fully set forth in the papers already filed by the parties. Accordingly, we refer to those materials and limit this statement to the following observations.

1. In 1974 Foremost sued Qantas for violating Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1 and 2, in connection with the arrangement and marketing ("packaging") of inclusive tours to South Pacific destinations.

The term "inclusive tour" refers to a tour which includes air transportation on a regularly scheduled flight, plus such land services as hotel accommodations, local

transportation, and sight-seeing trips.[1] Typically, the ground package is offered in combination with a "tour-basing" air fare that is lower than the regular economy fare, and availability of the reduced rate air transportation is conditioned upon purchase of the ground package.[2] The justification for this "promotional" fare is that it attracts passengers who would not use scheduled services if forced to pay the regular fare.

The tariff of an air carrier offering a tour-basing fare must include not only the air fare, but also the requirement that a ground package be purchased. Usually the tariffs containing tour-basing fares also set forth a minimum price for the ground package, as well as the kinds of services comprising the package, and a departure from the tariff terms could violate Sections 403, 404 and/or 411 of the Federal Aviation Act.[3] Since the Board has

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[1]Inclusive tours must be distinguished from inclusive tour *charters*. The charter flights are arranged by a tour operator who charters an aircraft from an air carrier and then, as a principal, sells seats to the general public as part of a package consisting of air transportation and land arrangements. By definition, inclusive tour charters do not involve scheduled service. See *American Airlines* v. *Civil Aeronautics Board*, 365 F. 2d 939 (C.A.D.C.). The Board regulates inclusive tour charters substantially. See 14 C.F.R. 378.2(d) and (d-1), 378.10(a), 378.16, 378a.2, paras. 8 and 11, and 378a.25(a)(1). Despite the similarity of the names and the fact that the same individuals and corporations may be tour operators for both inclusive tour packages and inclusive tour charters, Foremost's complaint focuses solely on the former activities, and only they are involved in this case.

[2]The ground package is usually but not always arranged by a "tour operator" independent of the carrier.

[3]Section 403(b), 49 U.S.C. 1373(b), requires adherence to tariffs; Section 404(b), 49 U.S.C. 1374(b), prohibits unfair preferences and undue discriminations; and Section 411, 49 U.S.C. 1381, forbids unfair or deceptive practices and unfair methods of competition in air transportation or the sale thereof.

power to enforce these provisions, the ground tour is in this limited sense regulated by the Board.

Unlike the air fare itself, however, the ground package is not regulated under the ratemaking provisions of the Act. The Board does not evaluate the ground package in terms of such standard ratemaking criteria as costs, value of service, and the like but instead focuses on the tour-basing fare itself.[4] Similarly, except in the respects already indicated, the Board does not otherwise regulate the business of selling "inclusive tours."

2. Foremost, a corporation engaged in the packaging of inclusive tours to the South Pacific, alleged in its complaint that Qantas began its unlawful course of action in November 1973, when it ceased a long-standing affiliation with Foremost in packaging inclusive tours and began marketing South Pacific inclusive tours through an "in-house" tour department known as Qantas Holidays. Foremost charged that Qantas distributed promotional materials substantially similar to those used by Foremost; promoted and sold tours to the South Pacific which

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[4]To use an extreme illustration, assume a regular economy fare of $800, and a tariff showing a tour-basing fare of $400 tied to a minimum ground package of $10. Many passengers who would otherwise pay the regular fare would obviously choose to pay $400 and throw away the $10 ground package. That practice would be inconsistent with the basic justification for tour-basing fares and would doubtless be disapproved by the Board. Such disapproval would rest, however, upon a determination that the *air fare* was too low in light of the conditions on its availability. It would not rest on an evaluation of the cost justification for the ground package or upon any other evaluation of the ground package in ratemaking terms.

were exact duplicates of the tours offered by Foremost; misrepresented to travel agents and prospective travelers that its tours were actually those of Foremost; sold tours below their actual cost for the purpose of saturating the market in order to eliminate Foremost as a competitor and to monopolize the market in the South Pacific; contrary to agreement, refused to deal with or provide air transportation to Foremost's customers; misappropriated business intended for Foremost by inducing actual and prospective customers of Foremost to switch to Qantas' tours; disparaged Foremost and interfered with Foremost's contracts and employees and induced parties with whom Foremost had made contracts to breach those contracts. The complaint alleged that Qantas engaged in these activities with predatory intent to injure and to eliminate Foremost as a competitor in the South Pacific markets and that, because of Qantas' actions, Foremost was in immediate and substantial danger of being eliminated from business (Pet. App. 55a-73a). Accordingly, simultaneously with the filing of the complaint, Foremost filed a motion for a preliminary injunction.

3. The district court, after hearing evidence, granted a preliminary injunction and denied Qantas' motion to dismiss the complaint (Pet. App. 30a-52a). The court found that Qantas was selling the land services portion of its inclusive tours "below cost" (Pet. App. 36a-37a, 48a, n. 8) and that such sales, together with other anti-competitive actions established a *prima facie* violation of the antitrust laws (Pet. App. 48a). However, the court also recognized that substantial portions of the complaint dealing with alleged unfair and deceptive practices were within the primary jurisdiction of the Civil Aeronautics Board under Section 411 of the Federal Aviation Act (49 U.S.C. 1381). And although the court rejected Qantas' contention that the Board's primary jurisdiction warranted dismissal of the complaint, it

held that the intermixing of matters within and without the Board's jurisdiction justified a stay of all court proceedings while the Board considered the case (Pet. App. 43a-46a).

The court also rejected Qantas' contention that the pricing of "in-house" inclusive tours and related practices had been immunized from antitrust liability under Section 414 of the Act, 49 U.S.C. 1384, by a series of Board rulings. This contention rested on the Board's approval of various resolutions of the International Air Transport Association (IATA) establishing tour-basing fares and the conditions on their availability, including a minimum price for the ground package.[5] Following approval of the agreements, the carriers, including Qantas, had filed tariffs setting forth these fares and conditions. Qantas asserted that its pricing of the land package was above the tariff minimum and that the Board's approval of the underlying IATA resolution immunized the carrier from the application of the antitrust laws to its pricing and marketing practices.[6] The court concluded that the agency's review of the land tour components "was not sufficiently

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[5]Fares for scheduled international air transportation are fixed through the "conference machinery" of IATA, the trade association of United States and foreign air carriers authorized to engage in scheduled international air transportation. This machinery involves consultation and agreement between United States and foreign air carriers on rates and fares. The agreements specify the fares to be charged for limited periods of time and are subject to approval by the governments of the carriers involved. The Board approves such agreements under Section 412 of the Federal Aviation Act, 49 U.S.C. 1382, and the rates established by the agreements are then embodied in tariffs which are filed with the Board under Section 403 of the Act (Pet. App. 58a).

[6]While rejecting antitrust immunity, the district court did refer to the Board the question whether Qantas was violating its tariff obligations (Pet. App. 41a-47a).

specific" to confer immunity under Section 414 (Pet. App. 41a).

Finally, because the court found sufficient evidence of irreparable injury to Foremost and a likelihood that Foremost would prevail on the merits of the antitrust complaint, it issued a preliminary injunction which, *inter alia*, prohibited Qantas from selling inclusive tours until it satisfied the court that the price for land services reflected Qantas' costs for such services and from shifting to its own tours passengers who sought to purchase Foremost tours (Pet. App. 51a-52a).[7]

4. The court of appeals unanimously affirmed (Pet. App. 18a-29a). The court held that the district court had correctly referred the case to the Board because of its "substantial interest in this litigation * * *" (Pet. App. 26a). It agreed with the district court that retention of jurisdiction (though with the case stayed) was proper because the business activity which was the focus of the antitrust complaint, the tour industry, "is not *per se* regulated by the CAB * * *" (Pet. App. 24a). Similarly, the court held that the Board had not immunized Qantas' conduct when it approved the IATA resolutions because the Board's authority, and hence immunizing power, generally does not extend to that conduct (Pet. App. 25a). Finally, the court held that the district court had authority to issue a preliminary injunction and had used that power properly in this case (Pet. App. 27a-29a).

5. Meanwhile, Foremost filed a complaint with the Board alleging that the conduct set forth in the antitrust complaint violated the Federal Aviation Act and the Board's regulations (Pet. App. 74a-93a). On December 15, 1975,

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[7] Two months later the court, after a hearing to determine whether the price for the land services reflected costs, provisionally vacated this portion of the preliminary injunction (Br. in Opp. 4, 19).

the Board's Bureau of Enforcement docketed a Petition for Enforcement incorporating those parts of the complaint relating to practices in the sale of air transportation. The Bureau agreed to investigate charges that below-cost pricing of land services is a rebate of air fare in violation of Section 403(b) or an undue preference in violation of Section 404(b) and that Qantas' bait-and-switch selling is an unfair practice "in air transportation or the sale thereof" violative of Section 411 (Pet. App. 94a-97a). On the other hand, the Bureau expressly declined to incorporate those parts of the complaint that were limited to Qantas' inclusive tour packaging activities and which did not affect the sale of air transportation, finding that it had no reason to believe that Qantas' "tour operator activities" were "air transportation services" (Pet. App. 105a).

DISCUSSION

The order of the district court—referring the case to the Board for the exercise of its primary jurisdiction while issuing a preliminary injunction to prevent irreparable injury to Foremost—reflects a proper accommodation of the respective roles of court and agency that comes well within the principles of this Court's decisions. The case presents no issue warranting review.

1. Qantas argues (Pet. 15, 16) that *Pan American World Airways* v. *United States*, 371 U.S. 296, "as a matter of jurisdiction," required the district court to dismiss Foremost's complaint in its entirety.

In *Pan American* this Court ordered an injunction vacated and the complaint dismissed in a civil antitrust action which challenged agreements by Pan American and another carrier to allocate routes and divide territories. The Court, while recognizing that the Board did not have exclusive jurisdiction over "every

antitrust violation by air carriers," 371 U.S. at 312, nevertheless held that certain activities, such as carrier route allocations and territorial divisions, were so "basic" to the regulatory scheme, 371 U.S. at 305, that operation of the antitrust laws must be displaced. Where such relationships and practices were placed under pervasive Board regulation, the Court said, Congress intended that administrative regulation, including the remedies available under Section 411, should supplant the normal play of market forces otherwise protected by the antitrust laws. 371 U.S. at 305, 310.

The matters raised by the antitrust complaint in this case, by contrast, are not "basic" to the regulatory scheme. The complaint did not challenge air fares or routes approved by the Board but rather claimed that Qantas had illegally attempted to eliminate competition in the packaging of inclusive tours, in part by misrepresenting its tours as those of Foremost and in part by selling land services below cost. Although petitioner claims that inclusive tours are "pervasively regulated by the CAB" (Pet. 14), this claim, as we have already discussed (pp. 2-3, *supra*), is inaccurate. The Board is not purporting to investigate all aspects of the packaging of inclusive tours; its interest in the price and other terms of the ground package of the inclusive tour in this case is with tariff-related matters (including the question whether petitioner's alleged below-cost pricing constitutes a disguised rebate of the fare for the air transportation), and with competitive practices.[8]

The fact that the Board has accepted jurisdiction over some matters raised in the antitrust complaint does not mean that the antitrust laws are inapplicable. The

[8]Of course, the Board's concern over the fare for the air transportation portion is no different from its concern with any other air transportation fare.

decision of the Board's Bureau of Enforcement—agreeing to investigate possible violations of Sections 403, 404, and 411 of the Act but declining to investigate matters not sufficiently connected to air transportation services—reflects the limited nature of the Board's concern and jurisdiction, and allows proper latitude for the operation of the antitrust laws. Although the challenged conduct may constitute an unfair practice in the sale of air transportation, subject to review by the Board under Section 411, that fact does not mean that the district court is deprived of jurisdiction. See *Nader* v. *Allegheny Airlines*, No. 75-455 (decided June 7, 1976).[9]

Finally, the preliminary injunction issued by the district court does not interfere with the Board's performance of its functions. Unlike the divestiture order in *Pan American*, which threatened to put the court and the agency in conflict, 371 U.S. at 309-310, this very limited injunction requires only that Qantas provide land services at a price which actually covers its costs (Pet. App. 51a).[10] The injunction does not restrict the agency's flexibility or discretion. The district court explicitly disavowed any such intent,[11] and emphasized that it would modify the

[9]*Nader* also precludes petitioner's argument (Pet. 16) that *Pan American*, as interpreted in *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363, 380, makes Section 411 the exclusive remedy for any conduct falling within its scope.

[10]Thus, the injunction did not operate in any way to alter or suspend Qantas' tariff obligations; the tariff, which merely sets forth a *minimum* cost for land services, remains as it was before the injunction was issued. Hence, there is no merit in Qantas' claim (Pet. 19-21) that the injunction suspends a tariff contrary to the decisions of this Court in *Arrow Transportation Co.* v. *Southern Railway*, 372 U.S. 658, and *United States* v. *SCRAP*, 412 U.S. 669.

[11]The district court stated that its retention of jurisdiction "is not to be interpreted as manifesting any intent * * * to restrict the scope of CAB's investigation and of rulings upon * * * the issues" (Pet. App. 50a).

preliminary injunction to conform with any exercise by the Board of its exclusive rate-making powers (Pet. App. 46a-47a, n. 7).[12]

2. There is also no reason for further review of Qantas' claim (Pet. 18-19) that this decision conflicts with *Hughes Tool Co.* v. *Trans World Airlines*, 409 U.S. 363. In *Hughes Tool* the Court held that the Board had conferred antitrust immunity upon aircraft sales and leases to TWA, since the Board had given specific consideration to each transaction and to its effects as part of a continuing review of Hughes Tool's control of TWA. Qantas asserts that the Board's approval of IATA-agreed minimum rates for land services amounts to a comparable approval.

Any similarity between this case and *Hughes Tool*, however, is more apparent than real. The Board in *Hughes Tool* had required, as an express condition for permitting control of TWA by Hughes Tool under Section 408, that each inter-corporate transaction of specified size receive Board approval. As the Court noted: "Each transaction was approved by the Board and each approval was an order under § 408, for the Board regarded its transactional orders as modifications or interpretations of its antecedent control order. Each of the modification orders recited a finding of the Board that the transactions were 'just and reasonable and in the public interest' " (409 U.S. at 379). No such review occurred here. The Board did not analyze in any detail the land services to be offered by Qantas but considered them only to the extent necessary to assure that the conditions for availability of the tour-basing air fare had been met. It did not scrutinize, let alone deliberately approve as being in the public interest, the allegedly below-cost pricing practices which

[12]Additionally, the central feature of the preliminary injunction was subsequently vacated by the district court on a provisional basis (see n. 7, *supra*).

are part of the subject matter of the antitrust complaint and the preliminary injunction.[13]

3. Finally, we see no merit in petitioner's contention (Pet. 21) that the district court was without power to issue temporary injunctive relief pending review by the Board. As a general matter, where a court may retain jurisdiction of a case pending reference to an agency, it should be able to exercise its traditional equitable powers to protect its own jurisdiction. See Jaffe, *Judicial Control of Administrative Action*, 656-657 (1965); *Brawner Building, Inc.* v. *Shehyn*, 442 F. 2d 847 (C.A. D.C.). Circumstances may exist, of course, in which the granting of temporary relief would be irreconcilable with referral to an agency or would cause friction between the judicial and administrative processes; those potential problems do not constitute a jurisdictional bar to injunctive relief but are properly part of the determination whether issuance of an injunction is in the public interest. See *Delaware River Port Authority* v. *Transamerican Trailer Transport, Inc.*, 501 F. 2d 917, 924 (C.A. 3).

In this case the district court specifically found that an injunction was necessary to prevent extinction of Foremost as a competitor in the inclusive tour business and provided that it would terminate any part of the injunction on which the Board took parallel action. Pet. App. 47a. That is a reasonable and desirable accommodation of the interests involved.

The cases cited by petitioner (Pet. 21-23) do not stand for a contrary *per se* rule. While language in *S.S.W., Inc.*

[13]Review by the Board of activities alleged to constitute unfair and deceptive practices under Section 411 does not provide a basis for immunity from the antitrust laws. "No power to immunize can be derived from the language of §411." *Nader* v. *Allegheny Airlines*, *supra*, slip op. 10.

v. *Air Transport Ass'n of America*, 191 F. 2d 658 (C.A. D.C.), and *Laveson* v. *Trans World Airlines*, 471 F. 2d 76 (C.A. 3), might be read broadly to suggest that all injunctive relief is barred when a case is referred to an agency for consideration, neither case involved temporary, limited injunctive relief of the type granted here. The court in each of those cases was confronted with the question whether referral to an agency was appropriate in the first instance and not whether a district court could give intermediate relief to preserve its own jurisdiction during the agency's review. Indeed, both the Third Circuit and District of Columbia Circuit have since recognized that temporary relief may be granted in appropriate cases. ***Brawner Building, Inc.*** v. ***Shehyn, supra; Delaware River Port Authority*** v. ***Transamerican Trailer Transport, Inc., supra.***

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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